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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1005

SIERRA CLUB AND CITIZENS FOR CLEAN AIR AND WATER,
Petitioners

v.

ROGERS C. B. MORTON, SECRETARY OF INTERIOR, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ROGERS C. B. MORTON, SECRETARY OF INTERIOR, ET AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Neither the opinion of the United States Court of Appeals for the Sixth Circuit (App. A, pp. 16-41) nor the memorandum opinion and order of the United States District Court for the Northern District of Ohio (App. A, pp. 1-15) has been reported.

JURISDICTION

The judgment of the court of appeals (App. A, p. 42) was entered on September 22, 1972. Petitioners' motion for rehearing en banc was denied on October 26, 1972 (App. A, p. 44). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a suit to review actions taken by federal officials is barred whenever the officials have general authority to take the action even though the complaint alleges that the action was taken in violation of specific federal statutes and was arbitrary, capricious, and an abuse of discretion.

2. Whether suit against federal officials to recover a portion of a National Wildlife Refuge which was conveyed, allegedly in violation of federal statutes, to private parties in exchange for private land is barred by sovereign immunity on the ground that the United States would, if the suit was successful, necessarily have to return the land it had obtained to its former owners.

3. Whether Congress has waived sovereign immunity as to suits brought under the Administrative Procedure Act.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are:

(a) National Wildlife Refuge System Administration Act of 1966, 80 Stat. 927, 16 U.S.C. 668dd;

(b) Endangered Species Conservation Act of 1969, 80 Stat. 926, 16 U.S.C. 668aa to 668bb;

(c) 31 Stat. 187, 16 U.S.C. 701;

(d) Fish and Wildlife Act of 1956, 70 Stat. 1119, 16 U.S.C. 742a;

(e) 43 C.F.R. 2204.2-1 (implementing the National Wildlife Refuge System Administration Act of 1966);

(f) Administrative Procedure Act, 80 Stat. 381, 5 U.S.C. 706.

These statutes and regulations are set forth in Appendix B, pp. 45-53.

STATEMENT

On May 5, 1967, the United States acquired the Navarre Marsh as a unit of the Ottawa National Wildlife Refuge, which was part of the National Wildlife Refuge System. On October 3, 1968, the Bureau of Sports Fisheries and Wildlife of the Department of Interior entered into a land exchange with the Cleveland Electric Illuminating Company and Toledo Edison Company (hereinafter "the utilities"). The utilities exchanged private lands which they owned, the Darby Marsh, for the Navarre Marsh.

The Sierra Club and Citizens for Clean Air and Water brought suit seeking a declaratory judgment that the exchange of land violated federal statutes governing the authority of the Secretary of Interior in administering the Wildlife Refuge System. After the suit was dismissed, plaintiffs filed an amended complaint seeking both a declaratory judgment and an order directing the utilities to return Navarre Marsh to the United States. Since the district court again dismissed the amended complaint, the facts alleged in the amended complaint must be taken as true for purposes of reviewing this determination.

The amended complaint alleged that Navarre Marsh covers 524 acres and is a large part of the southern Lake Erie marshes which are vital in the north-south flyway for migratory waterfowl. It is a regular stop for 250 species of waterfowl during their seasonal migrations,

including the bald eagle which is an endangered species. Many other animals, such as muskrats, raccoons, fox and occasionally deer, inhabit the marsh area. The lake adjacent to the marsh supports a wide variety of game and fish, and the last major walleye spawning ground in Lake Erie is only three nautical miles offshore. In comparison, the Darby Marsh, which was received by the government from the utilities, will produce a "wildlife refuge of extremely poor natural quality."

The utilities will use Navarre Marsh to construct the Davis-Besse Nuclear Power station with its associated facilities, including a water-intake canal, discharge conduits, roads and transmission lines. The proposed construction and operation of the nuclear power plant will cause serious and permanent damage to Navarre Marsh and its ecological system. As a result, it will be largely unfit for habitation by migratory birds. This harm to Navarre Marsh and surrounding areas will be irreversible. It cannot be cured by the provision in the exchange for leasing back the area of Navarre Marsh not used by the power plant to the Department of Interior for use as a wildlife refuge.

The original complaint was dismissed by the district court because of sovereign immunity. The amended complaint was dismissed on the grounds that suit was barred by sovereign immunity and that the Secretary's action was non-reviewable under the Administrative Procedure Act (App. A, pp. 14-15).

The Court of Appeals for the Sixth Circuit affirmed in a 2-to-1 decision. Judge Weick stated that (1) since the various statutes relied upon by plaintiffs give discretion to the Secretary of Interior, his actions are not judicially reviewable; and (2) the suit was barred by sovereign immunity because (a) the plaintiffs only challenged the particular exercise by the Secretary of Interior of his general authority to make land exchanges

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and (b) the action would in effect require the United States to surrender the land obtained from the utilities in the exchange (App. A, pp. 21, 26). Judge McCree concurred solely on the ground of sovereign immunity (App. A, p. 28). Judge Feikens disagreed that suit was barred by sovereign immunity or that the questions presented were not reviewable. He further concluded on the merits (App. A, p. 36):

> Plaintiffs allege that the Secretary acted without regard to the effect his action would have on birds and other endangered species which habitate Navarre Marsh. If this is so, the exchange must be set aside.[1]

REASONS FOR GRANTING THE WRIT

Petitioners submit that the decision below is clearly erroneous, involves issues of major national importance, and is in conflict with decisions of this Court and other courts of appeals.

1. Secretary of Interior entered into the exchange of land pursuant to 16 U.S.C. 668dd(b)(3) which allows him "to acquire lands or interests therein by exchange (a) for acquired lands or public lands under his jurisdiction which he finds suitable for disposition * * *." 16 U.S.C. 668dd(b)(3). 16 U.S.C. 668dd(b)(3) is a part

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[1] The district court concluded that plaintiffs had standing and the court of appeals implicitly upheld this determination. While one member of the court of appeals indicated some doubt as to standing (App. A, p. 27), the dissenting judge concluded that plaintiffs had standing (App. A, p. 31) and the concurring judge expressed no view on this issue (App. A, p. 28). In any event, plaintiffs clearly had standing under the amended complaint since they alleged that their members "regularly used and enjoyed the Navarre Marsh to observe and study the wildlife" (App. A, p. 31).

of the National Wildlife Refuge System Administration Act. Subsection (b) specifically begins by stating that exchange authority is given the Secretary "in administering the System" which, under 16 U.S.C. 668dd(a), is the National Wildlife Refuge System. Consequently, the Secretary is clearly required to comply with all federal statutes relating to the National Wildlife Refuge System. In addition, the statutes relied upon by the petitioners show, on their face, that they apply to land exchanges as well as other actions of the Secretary of Interior.

The Endangered Species Conservation Act. 16 U.S.C. 668aa(a) states that:

> The purposes of this Act are to provide a program for the conservation, protection, restoration and propagation of selected species of native fish and wildlife, including migratory birds, that are threatened with extinction.

Since the provision under which the exchange was made, 16 U.S.C. 668dd(b)(3), was a part of this same Act at the time of the land exchange, it is clear that such an exchange involved wildlife refuges, must serve the purpose of protecting migratory birds from extinction. It is likewise clear from another provision of the Act, 16 U.S.C. 668aa(b), that wildlife refuges must be administered in order to protect endangered species:

> It is further declared to be the policy of Congress that the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Defense together with the heads of bureaus, agencies, and services within their departments, shall seek to protect species of native fish and wildlife, including migratory birds, that are threatened with extinction, and, insofar as is practicable and consistent with the pri-

> mary purposes of such bureaus, agencies, and services, shall preserve the habitats of such threatened species on lands under their jurisdiction.

Thus, the Secretary of the Interior is directed to use all his authority, including the authority to manage wildlife refuges, to protect endangered species.

16 U.S.C. 668bb(d) directs the Secretary of Interior to "review other programs administered by him and, to the extent practicable, utilize such programs in furtherance of the purpose of this Act" and to "encourage other Federal agencies to utilize, where practicable, their authorities in furtherance of the purpose of this Act * * *." Since the purpose and policies of the Endangered Species Conservation Act—to protect endangered species—apply to other programs administered by the Secretary of the Interior and even to entirely different agencies of the federal government under 16 U.S.C. 668aa(b) and bb(d), these purposes and policies plainly apply to wildlife refuges such as Navarre Marsh.

16 U.S.C. 701. Section 701 provides that the Secretary of the Interior has the duty to preserve and restore game birds and other wild birds. This provision obviously applies to a wildlife refuge which is part of the National Wildlife Refuge System.

Fish and Wildlife Act of 1956. 16 U.S.C. 742a provides that the Fish and Wildlife Act "shall be administered with due regard to the inherent right of every citizen and resident of the United States to engage in fishing for his own pleasure, enjoyment, and betterment, and with the intent of maintaining and increasing the public opportunities for recreational use of our fish and wildlife resources * * *." Since the Act, 16 U.S.C. 742b, established the Bureau of Sports Fisheries and Wildlife within the United States Fish and Wildlife Service, which administered the Navarre Marsh Wildlife Refuge,

it is clear that this provision applies to the Bureau's actions in the present case.

The facts alleged in the complaint, if proved at trial, would clearly show that the Secretary of the Interior has violated these federal statutes. He has violated the Endangered Species Conservation Act because the exchange of land fails to protect an endangered species of wildlife, the bald eagle, and its habitat in the Navarre Marsh. 16 U.S.C. 668aa(a), (b), bb(a). He has violated 16 U.S.C. 701 by failing to preserve and restore game birds and other wild birds. And he has violated the Fish and Wildlife Act of 1956 by failing to protect fish and wildlife resources for recreational use. 16 U.S.C. 742a. All of these provisions have been violated by exchanging an extremely valuable and important wildlife refuge for a marsh that will harm migratory birds and other wildlife.

The majority of the court of appeals did not rule on these contentions. While one member of the panel concluded that the validity of the land exchange was not judicially reviewable (App. A, p. 21), affirmance of the district court's determination was based solely upon sovereign immunity (see App. A, p. 28). This conclusion was clearly erroneous.

First, the court found that "the Secretary of Interior had full authority to make the exchange and even if he erred in fact or in law the courts have no jurisdiction to interfere" (App. A, p. 28). It is of course well established that suit against a federal official is not barred by sovereign immunity if his action "is not within the officers' statutory powers * * *." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948). Accord, *Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962); *Dugan* v. *Rank*, 372 U.S. 609, 621-622 (1963). The amended complaint here explicitly alleged that the exchange both violated each of the statutes cited above and "is arbi-

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trary, capricious and in abuse of the exchange discretion."

Second, the court below concluded that the suit sought to divest the United States of property obtained from the utilities (App. A, p. 22). In fact, however, the complaint seeks only "to return title of Navarre Marsh to the United States." If title to Navarre Marsh is returned, we assume that the United States will return Darby Marsh to the utilities since there has never been any indication that the United States entered into the exchange for any reason of its own but did so rather to accommodate the utilities.

In any event, even if the United States decided not to return Darby Marsh, sovereign immunity does not apply. The utilities' remedy is to recover compensation for the property taken. *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 606-696; *Malone* v. *Bowdoin*, *supra*, 369 U.S. at 647-648. The utilities will have a full remedy through a suit for "just compensation for the taking of their land by the United States" in the Court of Claims. *Id.* at 647, note 8. Whatever may be the remedy of the utilities, there is no basis for barring suit to review whether federal officials disposed of public land in violation of federal statutes.

2. The decision of the court below that sovereign immunity applies because the complaint alleged only that the Secretary erred in fact or in law is inconsistent with this Court's decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), and decisions of other courts of appeals. In *Overton Park*, this Court held that the reviewing court must determine "whether on the facts the Secretary's decision can reasonably be said to be within that range" allowed by the applicable statute. *Id.* at 416. The Court then went on (*ibid.*):

> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted with-

> in the scope of his statutory authority. Section 706 (2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A) (1964 ed. Supp. V). To make this finding the court must consider * * * whether there has been a clear error of judgment.

Several courts of appeals have similarly reviewed decisions of federal officials to determine whether they have acted arbitrarily, capriciously, or in abuse of their discretion even though they had general authority to act. *Adams* v. *Witmer*, 271 F.2d 29, 33 (C.A. 9, 1958); *Coleman* v. *United States*, 363 F.2d 190, 196 (C.A. 9, 1966), reversed on other grounds, 390 U.S. 599 (1968); *Littell* v. *Morton*, 445 F.2d 1207, 1211 (C.A. 4, 1971). While the issue of sovereign immunity was not raised and therefore not specifically addressed in these cases, this Court and the courts of appeals necessarily determined that sovereign immunity does not bar actions brought under the Administrative Procedure Act to review actions of federal officials on the ground that they acted arbitrarily, capriciously, and abused their discretion.[2]

This issue is obviously of far-reaching importance. If suit can be brought to review the actions of federal offi-

[2] At least two courts of appeals and five district courts have rejected claims of sovereign immunity when, as here, the complaint alleged that federal officials had violated federal statutes designed to protect the environment. *Parker* v. *United States*, 448 F.2d 793, 798 (C.A. 10, 1971), certiorari denied, 405 U.S. 989 (National Wilderness Preservation System); *Ragland* v. *Mueller*, 460 F.2d 1196 (C.A. 5, 1972); *Izaac Walton League* v. *St. Clair*, 313 F. Supp. 312 (D. Minn., 1970) (National Wilderness Preservation System); *LaRaza Unida* v. *Volpe*, 337 F. Supp. 221 (N.D. Cal., 1971); *Cape May County Chapter, Inc.* v. *Macchia*, 329 F. Supp. 405 (D. N.J., 1971); *National Helium Corp.* v. *Morton*, 326 F. Supp. 151, 154 (D. Kans., 1971), affirmed, 455 F.2d 650 (C.A. 10, 1971); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 324 F. Supp. 878 (D. D.C., 1971).

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cials only when they have acted totally without any statutory authority, judicial review under the Administrative Procedure Act will be significantly restricted. Contrary to the language of the APA, review will not be permitted whenever a federal official has acted arbitrarily, capriciously, or in abuse of his statutory discretion.

3. The holding of the court that sovereign immunity bars the action because it will effect the title to land of the United States is in conflict with decisions of two courts of appeals even if we assume, contrary to our contention, that title to the land obtained by the United States is involved in this litigation. In *Brennan* v. *Udall*, 379 F.2d 803, 805 (1967), certiorari denied, 389 U.S. 975, the Court of Appeals for the Tenth Circuit rejected the contention that sovereign immunity prevented review of an action by a landowner contesting the title of the United States to mineral rights under his land. The court held that the action was reviewable under the Administrative Procedure Act.

Similarly, in *Knox Hill Tenant Council* v. *Washington*, 448 F.2d 1045, 1052-1053 (1971), the Court of Appeals for the District of Columbia Circuit held that the courts could entertain an action seeking to compel the United States to repair housing owned by it:

> If, after trial, it be found that appellees do in fact have a responsibility for the property in their care which they are not recognizing adequately, the court's power, at the least, to declare that responsibility and to define that fault is not dissipated solely by the circumstance that legal title to the property is in the United States. To hold otherwise would be to say that sovereign immunity forecloses any judicial inquiry whatsoever into the custodianship by a federal official of federal property. There is no magic about real estate, or its ownership by the United States, which hedges its guardians about with an

immunity not available to other executants of public policies committed to their care by the Congress.

In contrast, the court below has held that the actions of defendants are not reviewable in disposing of federal land allegedly in violation of federal law because, according to the court below, this will require surrender of the land obtained in exchange.

4. The decision of the court below that sovereign immunity bars review of the exchange of federal land, even if the plaintiffs allege violations of federal statutes, is also of great importance because it will prevent judicial review of a huge volume of federal land transactions affecting large areas of the country. The court below has decided that the validity of any such disposal of federal land cannot be challenged if the United States has actually received the land in exchange.

During the last four years, over 8,000 acres of land in the Wildlife Refuge System have been exchanged for other land under 16 U.S.C. 668dd. Far larger amounts of federal land have been exchanged under other similar statutes. The National Park Service exchanged over 100,000 acres of land in thirty-one different national parks, monuments, seashores, parkways and recreation areas between 1961 and 1968, and these exchanges are presumably continuing at a similar rate. The Forest Service has made exchanges of over 500,000 acres of National Forest land in the last eight years. In addition, the Bureau of Land Management, which administers other federal lands, exchanged 1,700,000 acres of land between 1966 and 1971.[3] All of these exchanges were made pursuant to statutes, like 16 U.S.C. 668dd(b)(3), which give authority to federal agencies to exchange lands

[3] The precise figures for these exchanges and the statutes under which the exchanges were made are set forth in Appendices C, pp. 54-56, and D, pp. 57-61.

which they administer for other privately-held or state-owned land.

There are approximately seventy federal statutes which provide for federal land exchanges (Appendix D, pp. 57-61). Consequently, the figures presented above represent, in all likelihood, only a portion of the land exchanges actually carried out. Thus, the ruling below will have a substantial effect upon large amounts of federal land which may be involved in future exchanges. Much of this land is in wildlife refuges, national parks and national forests which are of great environmental importance to the entire country.

In *Lewis* v. *Hickel*, 427 F.2d 673 (C.A. 9, 1970), the court of appeals considered the authority of the Secretary of Interior to exchange lands under the Taylor Grazing Act, 43 U.S.C. 315, *et seq.* The court stated that a land exchange can "not defeat the Congressional purpose" as stated in the Taylor Act. *Id.* at 676. Similarly, in *LaRue* v. *Udall*, 324 F.2d 428, 431 (C.A. D.C., 1963), certiorari denied, 376 U.S. 907, the court of appeals held that, in making a land exchange under the Taylor Grazing Act, it is the "Secretary's duty" to consider the purposes of the Act. Thus, the court clearly held that the purpose stated in the Act constituted a limitation upon the Secretary's power to make exchanges. On the other hand, if the ruling of the court below in the present case is correct, such land exchanges can be made without regard to the purposes for which this land has been acquired and for which it must be administered under the statutes passed by Congress.

The decision below is also inconsistent with that of the district court in *National Forest Preservation Group* v. *Butz*, 343 F. Supp. 696 (D. Mont., 1972). There, the district court was asked to enjoin land exchanges made by the Forest Service with private parties. While the

court upheld the exchanges, it carefully scrutinized them despite the fact that the federal government had already acquired the private land. *Id.* at 699.

5. The decision of the court below will also prevent judicial review of any other federal land transactions in which the United States has received compensation. Once a purchaser or lessee has paid money for federal land, it necessarily follows from the Sixth Circuit's decision that no court can determine whether the sale or lease was legally valid, even if it was plainly inconsistent with Congressional purposes. This would mean that consummated sales or patents of land under 43 U.S.C. 161, 218, 291 *et seq.*, 1165, and 1171; mineral leases and mining claims under 30 U.S.C. 22, 161, and 226; oil and gas leases under 30 U.S.C. 181 *et seq.* and 351 *et seq.*; grazing permits under 43 U.S.C. 315-315r; and timber sales under 16 U.S.C. 476 *et seq.*, all would be immunized from review. Millions of acres of federal land are involved in these transactions.

The Court of Appeals for the District of Columbia Circuit has held that federal officials may be required to cancel oil and gas leases (*Boesche* v. *Udall*, 303 F.2d 204, 206 (C.A. D.C., 1962), affirmed, 373 U.S. 472; *McKay* v. *Wahlenmaier*, 226 F.2d 35, 46-47 (C.A. D.C., 1955)) and grazing permits (*McNeil* v. *Seaton*, 281 F. 2d 931, 933 (C.A. D.C., 1960)) which were improperly granted. It is not clear in these cases whether payment to the United States had already been made because the courts did not consider this fact worthy even of comment. However, the determination below is, at the least, implicitly inconsistent with those decisions.

6. Even if the present suit would, under common law principles, be barred by sovereign immunity, the Administrative Procedure Act, 5 U.S.C. 706, specifically provides for review of agency actions which are:

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> (A) arbitrary, capricious or an abuse of discretion, or otherwise not in accordance with law; * * * (C) in excess of statutory jurisdiction, authority or limitations or short of statutory rights.

The court below, however, determined that "the Administrative Procedure Act does not waive sovereign immunity * * *" (App. A, p. 27). This determination is contrary to the decisions of the courts of appeals in five circuits.[4]

The United States Court of Appeals for the District of Columbia Circuit concluded that the Act was a waiver of sovereign immunity in *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 873 (1970):

> It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory.[5]

The Court of Appeals for the Fifth Circuit had earlier taken this same position in *Estrada* v. *Ahrens*, 296 F.2d 690, 698 (C.A. 5, 1961):

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[4] This Court has not ruled on this issue. In *Blackmar* v. *Guerre*, 342 U.S. 512, 515-516 (1952), the Court made the statement that "[s]till less is the Administrative Procedure Act to be deemed an implied waiver of all governmental immunity from suit." This statement was made, however, in the context of considering an entirely different issue whether the Civil Service Commission could be sued as a corporate entity or whether suit must be brought against the individual Commissioners. The Court's statement meant that the Commission could not be sued as such. The Court then immediately said that it assumed, "without deciding," that the Commission's actions were reviewable under the Administrative Procedure Act but found a lack of venue. *Id.* at 516.

[5] The Court of Appeals for the District of Columbia had previously stated that the Administrative Procedure Act did not constitute consent to suit. *Arizona ex rel. Arizona State Board of Public Welfare* v. *Hobby*, 221 F.2d 498, 500 note 6 (1954).

> By providing judicial review in an action brought by "any person adversely affected or aggrieved by any agency action" Congress permitted suits which under established tests would certainly be barred as suits against the government. * * * The act thereby makes a clear waiver of sovereign immunity in actions to which it applies.

The Court of Appeals for the Second Circuit has come to the same conclusion. *Kletschka* v. *Driver*, 411 F.2d 436, 445 (C.A. 2, 1969). Accord, *Powelton Civic Home Owners' Ass'n* v. *Department of Housing and Urban Development*, 284 F. Supp. 809, 834 (E.D. Pa., 1968); *Krawez* v. *Stans*, 306 F. Supp. 1230, 1233 (E.D. N.Y., 1969); *Schroeder Nursing Care, Inc.* v. *Mutual of Omaha Ins. Co.*, 311 F. Supp. 405, 409 (E.D. Wis., 1970); *A. G. Schoonmaker Co., Inc.* v. *Resor*, 319 F. Supp. 933, 940 (D. D.C., 1970); *General Motors Corp.* v. *Volpe*, 321 F. Supp. 1112, 1120 (D. Del., 1970); *National Helium Corp.* v. *Morton*, 346 F. Supp. 151, 154 (D. Kans., 1971), affirmed, 455 F.2d 650 (C.A. 10, 1971).

The Courts of Appeals for the Fourth and Ninth Circuits have also rejected the position of the Sixth Circuit. While they have not held that the Administrative Procedure Act automatically provides consent to suit, they have concluded that the Act significantly narrows the defense of sovereign immunity. In *Washington* v. *Udall*, 417 F.2d 1310, 1320 (C.A. 9, 1969), the court said that the Act does not provide for judicial review only in cases wherein "the immunity doctrine is so transcending as to require dismissal of the suit" and that the Act does provide a basis for review of governmental decisions where "the immunity doctrine is not so controlling so as to bar the suit."[6]

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[6] Previously, the Ninth Circuit had held that the Administrative Procedure Act constituted consent to suit without indicating any limitation on this holding. *Adams* v. *Witmer*, 271 F.2d 29, 34 (1959); *Mulry* v. *Driver*, 366 F.2d 544, 547 (1966).

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In *Littell* v. *Morton*, 445 F.2d 1207, 1214 (C.A. 4, 1971), after adopting the holding in *Washington* v. *Udall*, the court said:

> The rationale for sovereign immunity essentially boils down to substantial bothersome interference with the operation of government. It can be said with some justification that both Congress, through the enactment of the APA, and the courts, through liberal application of the APA and silence as to sovereign immunity, have largely rejected this rationale. However, to the extent that it is still viable, it is only tangentially present here. In no way will this case cause the Department of the Interior to be "stopped in its tracks" * * *.

Only the courts of appeals for two circuits have rejected the contention, as did the court below, that the Administrative Procedure Act contitutes consent to suit. *Cyrus* v. *United States*, 226 F.2d 416, 417 (C.A. 1, 1955); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (C.A. 8, 1967). See also *Coalition for United Community Action* v. *Romney*, 316 F. Supp. 742, 746 (N.D. Ill., 1970). In addition, the decisions of the Tenth Circuit are divided. Compare *Brennan* v. *Udall*, 379 F.2d 803, 805 (1967), certiorari denied, 389 U.S. 975 (the Act constitutes consent to suit), with *Chournos* v. *United States*, 335 F.2d 918, 919 (1964), *Cotter Corp.* v. *Seaborg*, 370 F.2d 686, 692, note 15 (1966), and *Motah* v. *United States*, 402 F.2d 1, 2 (1968) (the Act does not constitute consent).

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

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SUELLEN T. KEINER
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January 1973

FILE COPY

No.

Supreme Court, U. S.
FILED
JAN 18 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1005

SIERRA CLUB AND CITIZENS FOR CLEAN AIR AND WATER,
Petitioners,

v.

ROGERS C. B. MORTON, SECRETARY OF INTERIOR, ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDICES

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APPENDIX A

LOWER COURT OPINIONS

No. C70-971

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES EX REL. SIERRA CLUB, ET AL.,
Plaintiffs,

vs.

WALTER J. HICKEL, Individually and as Secretary of the Interior, ET AL.,
Defendants.

MEMORANDUM AND ORDER
(Filed September 16, 1971.)

THOMAS, *J.*

Sierra Club, a non-profit California corporation, and Citizens for Clean Air and Water, an Ohio non-profit corporation, have filed an amended complaint against Walter J. Hickel, individually and as Secretary of the Interior, United States Department of the Interior (his successor in office has not been substituted), Toledo Edison Company, and the Cleveland Electric Illuminating Company, "electric utilities corporations engaged in the business of supplying electrical power to the Northern Ohio area."

The amended complaint states that "this is an action for a declaratory judgment as authorized under 28 U.S.C. § 2201, and for appropriate relief under 28 U.S.C. § 2202." The court's jurisdiction is invoked under 28 U.S.C. § 1331 (1958) (cases arising under the constitution, laws or treaties of the United States), and 5 U.S.C.

§§ 702 and 706 (1966) (provisions of the Administrative Procedure Act).

Describing the transaction out of which this action grows, paragraph 7 of the amended complaint states:

> In October of 1967, defendants Toledo Edison and CEI, and the Department of the Interior, through its Bureau of Sports Fisheries and Wildlife, entered into an agreement in pursuance of which, on September 2, 1968, Toledo Edison by deed, conveyed the 480 acres of realty known as Darby Marsh to the United States government. Thereafter on October 3, 1968, the Secretary of the Interior, by deed, transferred Navarre Marsh, a unit of the Ottawa Federal Wildlife Refuge, to defendants Toledo Edison and CEI.

In their prayer the plaintiffs "pray for a declaration that the transfer of title to Navarre Marsh was and is an arbitrary and capricious act and constitutes an abuse of discretion." Plaintiffs then pray "that this Court implement said declaration by issuing an order directing defendants Toledo Edison and CEI to return title of Navarre Marsh to the United States."

Defendant Secretary of the Interior moves to dismiss the amended complaint. The two utility companies join in a separate motion to dismiss the amended complaint.

On April 5, 1971, in a scholarly memorandum of 27 pages, Judge Ben C. Green of this court dismissed the original complaint upon motions filed by the present defendants. On June 1, 1971, the individual docket system was instituted in this court, and this case is now assigned to the undersigned judge.

Judge Green determined that the plaintiffs have standing to sue; and his determination is accepted as law of the case. The principal ground upon which Judge Green dismissed the original complaint is as follows:

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> It is this Court's opinion that the complaint, with the relief as prayed for therein, may not be maintained as against the doctrine of sovereign immunity. As previously noted, the relief sought is a declaration that the land exchange is void and must be set aside as a nullity. The effect of such a decree would be to restore title to the lands involved to where they stood prior to the exchange. Consequently, although such a decree might not require affirmative action by the United States, it would involve "the disposition of unquestionably sovereign property" and would "expend itself on the public domain or interfere with the public administration." It is this Court's conclusion that under the line of authority in the Supreme Court, previously discussed herein, from *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1948) through *State of Hawaii* v. *Gordon*, 373 U.S. 57 (1963), this complaint must be considered as seeking relief which would work "an intolerable burden on governmental functions."

As was true of the original complaint the amended complaint seeks a declaratory judgment with reference to the exchange executed by the defendants of Navarre Marsh and Darby Marsh (Southern Lake Erie marshes in Ottawa County, Ohio). Similar allegations of fact appear in each complaint. It is said that the Secretary knew, or in the exercise of proper care, should have known that Navarre Marsh is a major link in the Southern Lake Erie marshes that constitutes "a pivotal point in the north-south flyway of migratory waterfowl," and was a "stopover point" on the Mississippi and Atlantic flyway for migratory birds, including certain endangered species. It is stated that Navarre Marsh supports a wide variety of animal life and is located "only three nautical miles from the last major walleye spawning ground in Lake Erie."

It is further alleged that at the time of the land transfer the defendant Secretary knew, or in the exercise of due diligence should have known, that Navarre Marsh was to be devoted, in part, to the construction of the Davis-Besse Nuclear Power Station, and that

> [T]his proposed construction would cause serious and permanent damage to the marsh area and its ecological systems, thereby rendering the marsh largely unfit for migratory bird inhabitation.

It is stated that the defendant Secretary of the Interior knew, or should have known, that the Davis-Besse Nuclear Power Station

> will discharge radioactive materials which will contaminate migratory waterfowl and cause serious, lasting, and irreparable damage to the numerous migratory bird species inhabiting the marsh.

It is also alleged that the defendant Secretary knew, or should have known, that although the exchange agreement requires

> defendants Toledo Edison and CEI to lease back the physically unoccupied portions of Navarre Marsh to the Department of the Interior for administration as a Federal Wildlife Refuge, said utility companies fully intend to fence off said area and limit entry to only those individuals they determine may enter a public wildlife leasehold, ...

The amended complaint states a single claim, while the original complaint contained four causes of action. The claim is predicated upon 5 U.S.C. §§ 702 and 706 (sections of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1966)). The Administrative Procedure Act was not mentioned in the original complaint but its application to the original complaint was argued in the briefs on the motions to dismiss.

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Paragraph 12 of the amended complaint states that:

> The aforesaid land transaction was carried out pursuant to the exchange authority of 16 U.S.C. § 668dd(b)(3). The exchange discretion of defendant Secretary of the Interior is subject to several statutory limitations and procedures, as more fully described hereinafter, none of which were complied with by said defendant.

Title 16 U.S.C. § 668dd was enacted by Public Law 89-669, § 4, 80 Stat. 926 (October 15, 1966). Its nine subsections relate to the National Wildlife Refuge System. Subsection (a) designates as the National Wildlife Refuge System

> [A]ll lands, waters and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas. . . .

Subsection (a) next provides that

> Nothing contained in this Act shall restrict the authority of the Secretary to modify or revoke public land withdrawals affecting lands in the System as presently constituted, or as it may be constituted, whenever he determines such action is consistent with the public interest. . . .

Under subsection 668dd(a) before determining that acquired lands should be transferred or disposed, except for land exchanges under subsection (b)(3), the Secretary of the Interior is required to consult with the Migratory Bird Conservation Commission (composed of himself, the Secretary of Transportation, the Secretary of Agriculture, two members of the Senate and two members of the House of Representatives).

"In administering the System" subsection 668dd(b) authorizes the Secretary

* * * *

> (3) to acquire lands or interests therein by exchange (a) for acquired lands or public lands under his jurisdiction which he finds suitable for disposition, or (b) for the right to remove, in accordance with such terms and conditions as the Secretary may prescribe, products from the acquired or public lands within the System. . . .

As seen, the first sentence of paragraph 12 of the amended complaint states that "the aforesaid land transfer was carried out pursuant to the exchange authority of 16 U.S.C. § 668dd(b)(3)." Plaintiffs agree that the "defendant Secretary of the Interior possessed a broad discretion under section 668dd(b)(3)." Analysis of section 668dd(b)(3) and its relationship to section 668dd (a) bears out this candid assessment. In the next sentence of their brief plaintiffs deny that this discretion is without limitation; and assert that "only if the discretion was entirely without limitation could it be said to be a situation where there exists 'no law to apply,' thereby precluding review." Plaintiffs are referring to 5 U.S.C. § 701(a) (1966) which excepts that application of the Administrative Procedure Act to the extent that

> (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

In *Citizens to Preserve Overton Park, Inc.* v. *John A. Volpe, Secretary of Transportation*, 401 U.S. 402, 410 (1971) the Supreme Court states that the exception "committed to agency discretion" is a "very narrow exception," and then adds:

> The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such

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> broad terms that in a given case there is no law to apply." S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

Applying 5 U.S.C. § 701(a) (1966), as interpreted in *Citizens to Preserve Overton Park, supra* Judge Green ruled that

> [T]he grant of authority to the Secretary of the Interior under section 668dd to determine that public lands under his jurisdiction are "suitable for disposition" "consistent with the public interest" is, standing alone a grant of totally discretionary power not subject to review under the A.P.A.

Since his ruling construes section 668dd "standing alone," (but including subsection 668dd(b)(3), the ruling is without reference to plaintiffs' present claim that statutes limit the Secretary's discretion under subsection 668 dd(b)(3).

Nevertheless, plaintiffs' present claim ignores the mutual exclusiveness of the application of the doctrine of sovereign immunity and the existence of the right of review under the Administrative Procedure Act. As *State of Washington* v. *Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969) holds:

> The Administrative Procedure Act may, however, provide a basis for review of governmental decisions if, and only if, the immunity doctrine is not so controlling as to bar the suit.

In their prayer for relief the plaintiffs partially seek "a declaration that the transfer of title to Navarre Marsh was and is an arbitrary and capricious act and constitutes an abuse of discretion." Plaintiffs thereby attempt to bring the amended complaint within the scope of review of the Administrative Procedure Act, 5 U.S.C. § 706 (1966). Parenthetically, if the prayer for relief went no

further it is doubtful that the amended complaint would present a justiciable issue. The prayer for relief then asks "that this court implement said declaration by issuing an order directing defendants Toledo Edison and CEI to return title of Navarre Marsh to the United States." Plaintiffs seek to bolster the second half of their prayer by stating in their brief that "No relief is sought against United States property." Thus plaintiffs seek to circumvent Judge Green's conclusion, in dismissing the original complaint, that

> The relief sought is a declaration that the land exchange is void and must be set aside as a nullity. The effect of such a decree would be to restore title to the lands involved to where they stood prior to the exchange.

Plaintiffs argue that

> Whatever claim the utilities might have as the result of the granting of the relief which plaintiffs have requested, could certainly be protected either by a cross-claim or a later action in the Court of Claims.

Manifestly, if the doctrine of sovereign immunity denies the jurisdiction of this court to declare the exchange agreement a nullity then this court also lacks jurisdiction to entertain a cross claim by the utilities seeking restoration of Darby Marsh from the Government, a disposition of "unquestionably sovereign property," *Larson*, *supra* at 619 n.11.

Invoking the equitable powers of this court plaintiffs ask for an order "directing defendants Toledo Edison and CEI to return title of Navarre Marsh to the United States." This court would not grant this request for equitable relief without simultaneously ordering the Government to return Darby Marsh to the utilities.

A decree in equity "should completely determine the controversy before the court," *Stonega Coke & Coal Co.* v. *Price*, 116 F.2d 618, 621 (4th Cir. 1940). Partial or incomplete decrees should not be entered, 27 Am. Jur. 2d *Equity* § 108 (1966). In more graphic language, "equity delights to do justice, and that not by halves," 30 C.J.S. *Equity* § 104 (1965). Thus the equitable relief now sought, as before, involves "the disposition of unquestionably sovereign property" and is barred by the doctrine of sovereign immunity as set forth in *Larson, supra* at 691 n.11.

In view of these conclusions the claimed statutory limitations on section 668dd(b)(3) are material only if one or more of these statutes bring the specific relief sought within the exceptions to the doctrine of sovereign immunity carved out in *Larson, supra.* One of these exceptions is the claim that the Government officer is acting unconstitutionally pursuant to an unconstitutional grant of power. *Larson, supra* at 690, 691. The original complaint in its fourth cause of action, claimed that 16 U.S.C. § 668dd "is an unconstitutional delegation of authority." This cause of action and this claim have been abandoned in the amended complaint. The other exception is described by *Larson* v. *Domestic and Foreign Corp., supra* at 689 in these words:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

In light of this *Larson* exception the claimed statutory limitations on section 668dd(b)(3) need to be studied to see if any of these statutes renders *ultra vires* the

land exchange authority exercised by the Secretary of the Interior in his 1967 exchange agreement with the defendant utilities and in the deed executed by him to Navarre Marsh on October 3, 1968.

> Paragraph 18 of the amended complaint charges that Section 668dd(b)(3) allows the Secretary of the Interior to dispose of National Wildlife Refuge System land holdings only if the land received in exchange (for addition to the System) is of approximately equal value to that given up, or if equalizing monetary payments are made to the United States.
>
> . . .

Paragraph 18 then alleges:

> Plaintiffs say that Darby Marsh is a wildlife refuge of extremely poor natural quality as compared to Navarre Marsh, that the Secretary knew or should have known of this fact at the time of exchange, and that his exchange of said properties constituted a breach of his duty to exercise his exchange discretion only in the light of the equal value provision of the authorization statute.

The first sentence of subsection (b)(3) has been quoted earlier. The second sentence of subsection (b)(3) reads:

> The values of the property so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

This last sentence of subsection (b)(3) is not construed as a limitation upon the authority of the Secretary to make land exchanges granted in the first sentence of the subsection. Rather, the second sentence invests the Secretary with incidental and additional authority to equalize values of the exchanged properties by payment of

cash to the grantor or by acceptance of cash from the grantor. Augmented but not restricted, by the second sentence the first sentence gives the Secretary of the Interior plenary authority to "acquire lands or interests therein by exchange. . . ." Under this congressional grant of unlimited authority the quality of the land the Secretary acquires by exchange for the National Wildlife Refuge System is left to his uncontrolled discretion.

Paragraph 16 of the amended complaint relates to 16 U.S.C. § 715(a) (1968). This section is part of the Migratory Bird Conservation Act, 16 U.S.C. §§ 715-715d, 715e, 715f-715k, and 715*l*-715r. Section 715a creates the Migratory Bird Conservation Commission, and authorizes the Commission "to consider and pass upon any area of land, water, or land and water that may be recommended by the Secretary of the Interior for purchase or rental under sections [of the Act]." It provides that "no purchase or rental shall be made of any such area until it has been duly approved for purchase or rental by said commission." Effective October 15, 1966, Public Law 89-669 enacted sections 668aa-668ee, amended other sections, and repealed certain sections, including 715d-1, 715d-2. In the place of these sections of the Migratory Bird Conservation Act that had generally provided for acceptance of land in exchange, Public Law 89-669 enacted section 668dd(b)(3) and granted plenary authority to the Secretary of the Interior to make land exchanges.

It is concluded that section 668dd(b)(3), adopted October 15, 1966, is a new and superseding grant of authority to the Secretary of the Interior to make land exchanges. It is wholly independent of and not limited by the purchase or rental provisions of section 715a. The special authority of the Secretary to make land exchanges, existing since 1966, is further documented by the amendment to section 668dd(a) enacted July 18, 1968. This amendment excepts acquired lands transferred or dis-

posed by the Secretary under his land exchange authority from all other acquired lands which he cannot transfer or dispose unless he "determines after consultation with the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established."

It is concluded that the authority of the Secretary of the Interior to make land exchanges granted by subsection 668(b)(3) is wholly independent of and not limited by the purchase or rental provisions of section 715a. In acquiring Darby Marsh in exchange for Navarre Marsh the Secretary of the Interior acted under section 668dd (b)(3). The lease back by the utility companies of a portion of Navarre Marsh for wildlife refuge purposes, as part of the land exchange, is deemed to be incidental to the Secretary's power to make a land exchange under subsection 668dd(b)(3). The lease back therefore is not subject to the rental provisions of section 715a.

In paragraphs 13, 14, 15, and 17, the plaintiffs claim that four other statutes limit the Secretary's land exchange discretion. The first of these is 16 U.S.C. § 668aa (a) and (b) (1969). Carrying out purposes announced in subsection 668aa(a), subsection 668aa(b) declares that the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Defense together with the heads of the various bureaus in their departments, shall seek to protect species of wildlife, including migratory birds, which are threatened with extinction. The subsection further declares it to be the policy of the Congress that these officers "insofar as is practicable and consistent with the primary purposes of such bureaus, agencies, and services, shall preserve the habitats of such threatened species on lands under their jurisdiction." Section 16 U.S.C. § 701 (1939) authorizes the Secretary of the Interior "to adopt such measures as may be necessary to carry out the purposes of this section and sec-

tion 667a of this Title, and to purchase game birds and other wild birds." The object of this section and section 667e of this Title, among other things, is "to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct."

Title 16 U.S.C. § 742a(3) (1956), among other things, declares that the provisions of section 742a-742j of this title

> . . . shall be administered with due regard to the inherent right of every citizen and resident of the United States to engage in fishing for his own pleasure, enjoyment, and betterment, and with the intent of maintaining and increasing the public opportunities for recreational use of our fish and wildlife resources, ...

Section 742b(c), also cited by the plaintiffs, provides that

> [A]ll functions and responsibilities placed in the Department of the Interior or any official thereof by sections 742a-742j of this title shall be included among the functions and responsibilities of the Secretary of the Interior, as the head of the Department, and shall be carried out under his direction. . . .

The final section relied upon by the plaintiffs is section 715i. A part of the Migratory Bird Conservation Act, section 715i provides that areas of lands, waters, or interests therein acquired or reserved pursuant to sections of Title 16

> . . . shall, unless otherwise provided by law, be administered by the Secretary of the Interior under rules and regulations prescribed by him to conserve and protect migratory birds in accordance with

> treaty obligations with Mexico and Canada, and other species of wildlife found thereon, including species that are threatened with extinction, and to restore or develop adequate wildlife habitat.

Several of these recited sections spell out statutory responsibilities of the Secretary of the Interior, delegated to him by Congress, that must be met if our migratory birds and species of wildlife, faced with extinction, are to be conserved and protected. Other sections charge the Secretary with administrative duties that must be shouldered if due regard is to be given "to the inherent right of every citizen and resident of the United States to engage in fishing for his own pleasure, enjoyment, and betterment" and "if the public opportunities for recreational use of our fish and wildlife resources" are to be maintained and increased. In sum, the plaintiffs contend that the Secretary of the Interior has failed to meet these responsibilities and duties in exercising his broad grant of authority to exchange lands in the National Wildlife Refuge System in accordance with section 668dd(b)(3). Plaintiffs' contentions, though made forcefully and in obvious good faith, do not make out a legally sufficient claim, in the view of this court. This is determined as a matter of law because Congress has not expressly or implicitly made compliance with these responsibilities and duties a condition of the exercise by the Secretary of his authority to make land exchanges under subsection 668dd(b)(3).

In specific conclusions none of the alleged statutory limitations on subsection (b)(3) renders *ultra vires* the exchange of Navarre Marsh for Darby Marsh admittedly exercised under subsection 668dd(b)(3). Thus, the amended complaint, as was true of the original complaint, in the words of Judge Green, "may not be maintained as against the doctrine of sovereign immunity." Yet even if the doctrine of sovereign immunity were in-

applicable the exercise of the Secretary's plenary authority to make land exchanges under section 668dd(b)(3) is not reviewable under the Administrative Procedure Act. The statutes cited by the plaintiffs in paragraphs 13 through 18 of the amended complaint disclose no congressional intention to limit section 668dd(b)(3). Hence, the Secretary's exercise of this plenary authority is "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2) and, therefore, not reviewable under the Administrative Procedure Act.

The questions presented by the motions to dismiss are not factual and do not require the taking of evidence. Instead, these questions should be adjudicated as matters of law. The motions to dismiss the amended complaint, brought by the Secretary of the Interior and by the utility companies, are granted with prejudice.

IT IS SO ORDERED.

WILLIAM K. THOMAS
United States District Judge

Nos. 71-1940 & 71-1941

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIERRA CLUB, ET AL.,
Plaintiffs-Appellants
and Cross-Appellees,

v.

WALTER J. HICKEL, ETC., ET AL.,
Defendants-Appellees
and Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Decided and Filed September 22, 1972.

Before WEICK, MCCREE, Circuit Judges, and FEIKENS,* District Judge.

WEICK, Circuit Judge. Sierra Club and Citizens for Clean Air and Water filed their complaint in the District Court for declaratory judgment, restraining order and equitable relief in which they sought to nullify a completed exchange of lands between the Secretary of Interior and two public utility companies (Toledo Edison Company and Cleveland Electric Illuminating Co., C.E.I.), made two years previously, claiming that the exchange agree-

* The Honorable John Feikens, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

ment was improper and unauthorized and in derogation of the Secretary's statutory duties and void. They further sought to enjoin the Director of the Atomic Energy Commission and the Commission from holding hearings for the issuance of a construction permit and to revoke the previous construction exemption granted by the Commission. They further sought a declaration that the exchange of lands violated a treaty with Mexico known as the "Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals" and a declaration that 16 U.S.C. § 688dd, under which statute the exchange was made, was unconstitutional.

Motions to dismiss were filed by the Secretary and the two utility companies and were submitted to District Judge Green. In a memorandum opinion and order, Judge Green held that plaintiffs had standing to sue but granted the motions to dismiss on the grounds of sovereign immunity and that agency action, committed by law to agency discretion, was not reviewable by the courts.

Plaintiffs then filed an amended complaint which was a radical departure from their original complaint. The amended complaint contained only one cause of action whereas the original complaint had set forth four. This amended complaint sought only to declare that the transfer of title from the United States to the two public utilities "was and is an arbitrary and capricious act and constitutes an abuse of discretion. Plaintiffs pray that this Court implement said declaration by issuing an order directing defendants Toledo Edison and C.E.I. to return title to the Navarre Marsh to the United States." [1] It is significant that plaintiffs did not ask that the United

[1] The amended complaint abandoned Plaintiffs' claim against the Director of the Atomic Energy Commission and the Commission, and also abandoned plaintiffs' claims of treaty violation and the alleged unconstitutionality of 16 U.S.C. § 668dd.

States be ordered to return to the utilities the title to the land which the Government received from them in the exchange. This omission, obviously, was not an oversight on the part of the plaintiffs but a clear recognition on their part of the salutary rule that no court has jurisdiction to divest title of the United States to sovereign property. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), *rehearing denied*, 338 U.S. 840 (1949). The position of the plaintiffs, if adopted by the Court, would leave the two utilities in a very precarious position, losing the land which they acquired by exchange and also the Darby Marsh which they conveyed to the Government. Plaintiffs, however, in their brief suggest that the utilities may not be entirely without any remedy as they might sue the United States in the Court of Claims for damages for confiscating their property. This is a hollow remedy as the utilities should be entitled to the return of their property as a matter of right if the exchange is rescinded.

The Secretary and the utilities filed a motion to dismiss the amended complaint which was submitted to District Judge William K. Thomas under the individual calendar system. Judge Thomas considered the matter and in a Memorandum Opinion and Order granted the motions to dismiss on the same grounds as were relied on by District Judge Green. The plaintiffs have appealed. The defendants cross-appealed raising the issue of standing. We affirm.

I

The Exchange of Lands

The two utilities which serve northern Ohio with electric power are co-developers of the Davis-Besse Nuclear Power Station. Initially, and prior to 1968, they had secured an option on and later acquired the legal title to a 480-acre tract of land in Ottawa County, Ohio, abutting on Lake

Erie, and known as Darby Marsh. The United States owned a tract of land in the same county bordering on the lake and consisting of about 455 acres of marshland and 77 acres in a corner most of which was upland. It was known as the Navarre Marsh and is located further away from Port Clinton, Ohio, than Darby Marsh.

The United States, acting through its Department of Interior, Fish and Wildlife Service, Bureau of Sport Fisheries and Wildlife, entered into a written agreement with the utilities to exchange the Navarre Marsh for the Darby Marsh. As part of the consideration, the utilities agreed to lease back to the United States, rent free for fifty years, about 455 acres (except strips for water canals) and another similar lease for twenty-five years of adjacent lands for a wildlife refuge subject to certain reserved rights. The utilities further agreed to spend up to $175,000 to rebuild 3200 feet of dikes on the Darby Marsh; maintain dikes on the north and south sides of the Navarre Marsh, and install three electric pumps on the Navarre Marsh to maintain proper water levels. The exchange was completed on October 3, 1968, when the utilities conveyed the Darby Marsh to the United States and the Government conveyed Navarre Marsh to the utilities. Upon completion of the exchange, the United States had a wildlife refuge of twice the number of acres it originally had (less the strips for canals and reserved rights) and, in addition, the improvements and benefits above related.

II

The Authority of the Secretary of Interior

In making the exchange, the Secretary acted under the authority of 16 U.S.C. § 668dd (d) (3)* which provides as follows:

---

* This is the statute which plaintiffs originally claimed was unconstitutional but later abandoned that claim.

"(b) In administering the System, the Secretary is authorized—

* * *

(3) to acquire land or interests therein by exchange (a) for acquired lands or public lands under his jurisdiction which he finds suitable for disposition, or (b) for the right to remove, in accordance with such terms and conditions as the Secretary may prescribe, products from the acquired or public lands within the System. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require."

It will be noted, as plaintiffs agree, that the statute confers broad discretion on the Secretary in the exchange of lands. No conditions relating to the environment were imposed in the statute. This is made clear by § 668dd(a) which provides:

"(a) . . . No acquired lands which are or become a part of the System may be transferred or otherwise disposed of under any provision of law (*except by exchange pursuant to subsection (b)(3) of this section*) unless (1) the Secretary of the Interior determines after consultation with the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established, and (2) such lands are transferred or otherwise disposed of for an amount not less than (A) the acquisition costs of such lands, in the case of lands of the System which were purchased by the United States with funds from the migratory bird conservation fund, or (b) the fair market value of such lands (as determined by the Secretary of the date of the transfer or disposal), in the case of lands of the System which were donated to the System. The Secretary shall pay into the migratory bird conservation fund the aggregate

amount of the proceeds of any transfer or disposal referred to in the preceding sentence." (Italics added)

Plaintiffs contend that the Secretary violated 16 U.S.C. §§ 701, 715a, 715i, 742a, 742b (c).

Sections 715 and 715i apply only to lands for purchase or rent under §§ 715-715d, 715e, 715f-715k and 715l-715r.

The remaining sections, namely, 16 U.S.C. §§ 701, 742 (a) (3) and 742b set forth the goals of the Department of Interior under the Migratory Game and Insectivorous Bird Chapter of Title 16. They contain no limitation on the Secretaries' authority in the exchange of lands.

The Administrative Procedure Act (APA) 5 U.S.C. § 701, et seq., relied on by plaintiffs, expressly excepts its application to the extent that "agency action is committed to agency discretion by law" 5 U.S.C. § 701 (a) (2). Since, as we have pointed out, the Secretary had discretion to determine whether he should enter into the agreement for the exchange of the lands, his action in so doing is not reviewable by the courts. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958); *United States* v. *Walker*, 409 F.2d 477 (9th Cir. 1969); *Knight Newspapers, Inc.* v. *United States*, 395 F.2d 353 (6th Cir. 1968); *Ferry* v. *Udall*, 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

III

Sovereign Immunity

The Supreme Court made it clear that in a case of this type the crucial question "is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." *Larson* v. *Domestic Foreign Commerce Corp., supra.*

This is very easy to determine in the present case where the plaintiffs are attacking the validity of a completed exchange of lands between the sovereign and private persons. Their claim that, since filing their amended complaint, they are not now asking for any relief against United States property is transparent. District Judge Thomas in his Memorandum properly characterized it as follows:

> "Thus plaintiffs seek to circumvent Judge Green's conclusion, in dismissing the original complaint, that
>
> > The relief sought is a declaration that the land exchange is void and must be set aside as a nullity. The effect of such a decree would be to restore title to the lands involved to where they stood prior to the exchange.
> >
> > Plaintiffs argue that
> >
> > Whatever claim the utilities might have as the result of the granting of the relief which plaintiffs have requested, could certainly be protected either by a cross-claim or a later action in the Court of Claims.
>
> Manifestly, if the doctrine of sovereign immunity denies the jurisdiction of this court to declare the exchange agreement a nullity then this court also lacks jurisdiction to entertain a cross claim by the utilities seeking restoration of Darby Marsh from the Government, a disposition of 'unquestionably sovereign property,' *Larson, supra* at 619 n.11.
>
> Invoking the equitable powers of this court plaintiffs ask for an order directing defendants Toledo Edison and CEI to return title of Navarre Marsh to the United States.' This court would not grant this request for equitable relief without simultaneously ordering the Government to return Darby Marsh to the utilities.
>
> A decree in equity 'should completely determine the controversy before the court,' *Stonega Coke &*

> *Coal Co.* v. *Price*, 116 F.2d 618, 621 (4th Cir. 1940). Partial or incomplete decrees should not be entered, 27 Am. Jur. 2d *Equity* § 108 (1966). In more graphic language, 'equity delights to do justice, and that not by halves,' 30 C.J.S. *Equity* § 104 (1965). Thus the equitable relief now sought, as before, involves 'the disposition of unquestionably sovereign property' and is barred by the doctrine of sovereign immunity as set forth in *Larson, supra* at 691 n.11."

Certainly if the United States were seeking to rescind the exchange of lands (which it is not) a court of equity, in granting such relief, would restore the parties to status quo. The Court would not require the filing of a cross-claim or a suit for damages in the Court of Claims in order to do equity and justice to the parties. The Government has not appropriated or confiscated property of the utilities and they would have no basis for filing either a cross-claim in this action or a damage suit in the Court of Claims. Here both the United States and the utilities are adhering to their contract. Since the United States could not rescind the exchange without restoring the utilities to status quo, it hardly seems necessary to point out that a stranger to the transaction stands in no better position.

We assume that plaintiffs made the Secretary of the Interior a party defendant to this action for a definite purpose, namely, to bind him as well as the United States by any decree of the Court.

The plaintiffs are asking the Court to declare "that the transfer of title to Navarre Marsh was and is an arbitrary and capricious act and constitutes an abuse of discretion. Plaintiffs further pray that this Court implement said declaration by issuing an order directing defendants Toledo Edison and CEI to return title of Navarre Marsh to the United States."

As District Judge Thomas so aptly pointed out, the Court would not issue such an order without restoring

title to Darby Marsh in the utilities. *Stevens* v. *McCoy*, 60 Ohio St. 540 (1899); 21 O. Jur. 2d, Exchange of Property, § 8; 30 Am. Jur. 2d, Exchange of Property § 41.

Equitable principles apply to the Government as well as to private individuals except when limited by statutory provisions. *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321 (1906); *Jacobs* v. *United States*, 239 F.2d 459 (4th Cir. 1956), *cert. denied*, 353 U.S. 904 (1957).

In *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, the Court said:

> "The request for an adjudication of the validity of the sale was thus, even in form, a request for an adjudication against the sovereign. Such a declaration of the rights of the respondent *vis-a-vis* the United States would clearly have been beyond the court's jurisdiction." *Id.* p. 689 fn. 9.

It was argued that the action of the Secretary is invalid because it was based on an incorrect decision as to both law and fact. This argument was effectively answered in *Larson*, where the Court said:

> "It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. *Adams* v. *Nagle*, 303 U.S. 532, 542 (1938). We therefore reject that con-

> tention here. We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. *But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.*" (Italics ours)

The Court further stated (at page 704):

> "As was early recognized, 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . .'"

Other cases following and applying the rule in *Larson* v. *Domestic & Foreign Commerce Corp., supra*, are: *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan* v. *Rank*, 372 U.S. 609 (1956); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962); See also *Adams* v. *Nagle*, 303 U.S. 532, 542 (1938).

In *Ogletree* v. *McNamara*, 449 F.2d 93 (6th Cir. 1971), in referring to sovereign immunity, we said:

> "Perhaps the minimum statement of that doctrine is that litigation must not be allowed to stop government in its tracks. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704, 69 S.Ct. 1457, 93 L. Ed. 1628 (1949). In this regard the effect of the action upon the sovereign rather than its form is controlling. The fact that the defendants are all named as individuals does not change the result." (Citing authority.)

One thing is certain and that is that if a third person is allowed to litigate the validity of exchanges of land made

by the Secretary of Interior, whenever he believes that the Secretary acted improperly, there will be no more exchanges and the action of Congress providing for them will be frustrated.

In *Sergeant* v. *Fudge*, 238 F.2d 916 (6th Cir. 1956), we held that a litigant could not enjoin a decision by the Postmaster General to discontinue a post office. Similarly, in *Manhattan Bronx Postal Union* v. *Gronouski*, 350 F.2d 451, 455 (D.C. Cir. 1965), *cert. den.* 382 U.S. 978, the Postmaster General's refusal to recognize the Postal Union was held not to be reviewable by the courts notwithstanding the claim that the decision was "unlawful, arbitrary and capricious" and "in violation of Executive Order No. 10988."

The Court said:

> "The short of appellants' case is that appellee has misconstrued the President's instructions, and the law is clear that an officer of the United States does not act outside his authority whenever he acts upon an erroneous decision of law or fact, if he is empowered to make the decision. See Larson v. Domestic and Foreign Commerce Corp., *supra*, 337 U.S. at 695, 703, 69 S.Ct. 1457; Arizona ex rel. Arizona State Bd. of Public Welfare v. Hobby, 94 U.S.App. D.C. 170, 221 F.2d 498 (1954); Seiden v. Larson, *supra*, 88 U.S.App.D.C. at 263, 188 F.2d at 666."

There is no question but that the Secretary of Interior was empowered by § 688dd (b) (3) to make the exchange. Furthermore, it should be pointed out that "the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign on the disposition of unquestionably sovereign property." *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, fn. 11 at 691.

Here the United States and the two utilities have owned, possessed and used for more than two years the

lands which they respectively acquired by deeds of conveyance in the exchange. The District Court has no jurisdiction to undo and unravel the transaction.

The Administrative Procedure Act does not waive sovereign immunity in an action involving the Secretary of Interior. *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967). See also: *State of Washington* v. *Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969); *Motah* v. *United States*, 402 F.2d 1 (10th Cir. 1968); *Cotter Corp.* v. *Seaborg*, 370 F.2d 686 (10th Cir. 1966); *Chournos* v. *United States*, 335 F.2d 918 (10th Cir. 1964); *Cyrus* v. *United States*, 226 F.2d 416 (1st Cir. 1955); *Coalition for United Community Action* v. *Romney*, 316 F.Supp. 742 (N.D. Ill. 1970).

IV

Standing

We have difficulty in following the argument that plaintiff's members were using and enjoying the marsh which is a wildlife refuge or sanctuary for migratory birds, or that the exchange of lands would interfere with the right of plaintiff's members to fish in Lake Erie. The marsh is not like a park which the public is invited to use.

Plaintiff's action was to set aside an exchange of lands. It was not an action to enjoin the construction or operation of an atomic energy plant.

Since we have disposed of this case on its merits, it is not necessary for us to decide the issue of standing.

V

The Dissent

The dissent states:

"Can a nuclear power plant and a wildlife refuge exist side by side in the same marsh? That is the issue in this

case." Respectfully disagreeing, that is not the issue in this case. As before stated, the plaintiff's action was not to enjoin the construction or operation of a nuclear power plant but rather to set aside an exchange of lands completed two years prior to the institution of this action and without restoring the parties to the status quo. We have shown that sovereign property cannot be taken from the government by the courts. The dissent undertakes to do this very thing contrary to the position taken by the plaintiffs on this issue. The Secretary of Interior had full authority to make the exchange and even if he erred in fact or in law the courts have no jurisdiction to interfere.

Affirmed.

McCREE, Circuit Judge (concurring). I agree that the doctrine of sovereign immunity bars plaintiffs' action against the Secretary. *See Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962); *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949); *see generally* Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387 (1970); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963). And since this action cannot be maintained against the Secretary, an independent basis for suing the utility companies must appear in the amended complaint, and my examination of the pleadings discloses none. The complaint, construed most favorably to the plaintiffs, does not contend that in the land exchange the nongovernmental defendants injured rights possessed by the plaintiffs. In these circumstances, I believe that the complaint was properly dismissed. It should be emphasized that this dismissal intimates no view on any subsequent action that might be brought by plaintiffs against the utilities to determine the rights and

duties of the parties respecting the utilization of Navarre Marsh.

FEIKENS, District Judge (dissenting). There are competing interests in our country between the need to preserve our environment and the demand for new sources of power and energy. It is not easy to find a proper balance between these needs, but it is a task that must be begun or the results of indecision—a destroyed environment—will preclude any balance at all. Can a nuclear power plant and a wildlife refuge exist side by side in the same marsh? That is the issue in this case.

In the past decade, Congress has evidenced a clear mandate that this task of balancing must be commenced.

The Sierra Club and the Citizens for Clean Air and Water commenced this suit to seek a determination whether the Secretary of the Interior made such a studied balance in giving up a part of land in the National Wildlife Refuge System so that a nuclear power plant could be erected there.

In an affidavit which was filed in the District Court, Secretary of the Interior Stewart Udall, who was in office at the time of the exchange, testified:

> "1. During the exchange negotiations and formal exchange of Navarre Marsh for Darby Marsh in 1967-1968, I was the duly appointed Secretary of the Department of the Interior for the government of the United States.
>
> "2. At and during the period of time during which the aforesaid land exchange was under consideration by the Department's Bureau of Sports Fisheries and Wildlife, I received only a superficial explanation of the proposed land exchange. Due to this fact, the ecological consequences of this transaction were not brought to my attention.

"3. On the 15th day of February, 1971, the sworn affidavits of Drs. Skoch, Trautman, and Meeks, as well as those of Messrs. Van Camp, Lau, and Trenchard, were submitted to me. I have familiarized myself with the facts related therein.

"4. Had the facts stated in the aforementioned affidavits been brought to my attention during the Department's decision-making process, I most probably would have refused to approve the exchange.

"5. Having read the aforesaid affidavits and having familiarized myself generally with the proposed Navarre Marsh construction plans of the electric utility companies, e.g., the expected excavation and laying of a submerged outflow pipe for the Davis-Besse Plant, I join in the conclusion of the natural scientists that irreparable damage will most probably be caused to a known, valuable wildlife refuge area by further construction within its confines."

The Navarre Marsh, the subject matter of this litigation, was acquired by the Government on May 5, 1967. In October, five months later, the Secretary entered into an agreement to transfer this land as a part of an exchange for another marsh. Presumably at the time of its acquisition the Secretary followed statutory requirements and determined before purchase that this marsh was necessary for the conservation of migratory birds and other wildlife, 16 U.S.C. § 715(a), and yet five months later, this land was bargained away. Plaintiffs have asked that this transfer be set aside unless it can be shown that the Secretary either followed the statute under which he was proceeding by making a determination that the wildlife refuge was no longer necessary for conservation purposes or by making a determination that the exchange and the resultant use of the marsh would not be harmful to the wildlife refuge system.

Of preliminary concern is the question of standing.

Standing, as recently stated by the Supreme Court in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), requires a preliminary showing of individual injury. This has been satisfied here. Plaintiffs have alleged in their complaint:

> "In addition, the Sierra Club and the Citizens for Clean Air & Water represent a class composed of their individual members who reside in the Northern Ohio area and who have regularly used and enjoyed the Navarre Marsh to observe and study the wildlife which inhabit the Navarre Marsh and the migratory birds which frequent the Navarre Marsh as a stopover point on their northerly and southerly migrations, and other members of the Sierra Club and Citizens for Clean & Water who regularly fish in the area of Lake Erie adjacent to the Navarre Marsh. Plaintiffs further state that the illegal and improper exchange of Navarre Marsh for other lands, has caused and will cause severe damage to the individual conservation and aesthetic interests of their members as more particularly set forth hereinafter."

Furthermore, it is clear that:

> ". . . once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate." *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

So, since plaintiffs have shown requisite standing in making their cause of action, they may properly assert the public interest in framing their claims.

The complaint alleges that the Secretary failed to consider the intent and purposes of the various acts under which he is required to act and that his conduct was accordingly *ultra vires.*

16 U.S.C. § 701 requires the Secretary to preserve and protect game and other wild birds.

"The duties and powers of the Department of the Interior include the preservation, distribution, introduction and restoration of game birds and other wild birds."

16 U.S.C. § 715i directs him to protect migratory birds in accordance with treaties with Canada and Mexico, and to protect other wildlife and to develop adequate wildlife habitats.

> "§ 715i. Administration—Treaty obligations; rules and regulations
>
> "(a) Areas of lands . . . or interests therein acquired or reserved pursuant to sections 715-715d, 715e, 715f-715k, and 715n-715r of this title shall, unless otherwise provided by law, be administered by the Secretary of the Interior under rules and regulations prescribed by him to conserve and protect migratory birds in accordance with treaty obligations with Mexico and Canada, and other species of wildlife found thereon, including species that are threatened with extinction, and to restore or develop adequate wildlife habitat."

16 U.S.C. § 742a(3) requires him to protect fish and other wildlife resources.

16 U.S.C. § 668aa(f), the Endangered Species of Fish and Wildlife Act, is the act under which this exchange was made (16 U.S.C. § 668dd(i)). Here Congress has stated:

> ". . . The purposes of this Act are to provide a program for the conservation, protection, restoration and propagation of selected species of native fish and wildlife, including migratory birds, that are threatened with extinction." 16 U.S.C. § 668aa.

These sections illustrate strong congressional intent to preserve our environment and the natural habitat of birds and other wild animals. In this respect, it would be well to keep in mind the congressional admonition

found in the National Environmental Policy Act (42 U.S.C. § 4331) that:

> ". . . it is the *continuing* policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a).[1] (Emphasis added.)

The section under which the Secretary acted states:

> "(b) In administering the System, the Secretary is authorized—
>
> * * * *
>
> (3) to acquire lands or interests therein by exchange (a) for acquired lands or public lands . . . which he finds suitable for disposition. . ." 16 U.S.C. § 668dd(b)(3).

This language is part of the Endangered Species of Fish and Wildlife Act added in 1966.

Defendants contend that this section gives the Secretary total discretion to dispose of any land, regardless of the harmful effect such transfer would have on the system he is required to administer. This contention is unacceptable. The intent of Congress is clear. It has stated, ". . . The purposes of this act are to provide a

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[1] I do not intimate that a retroactive application of the E.P.A. is the cornerstone of plaintiffs' complaint although some courts have applied this act to existing projects insofar as is practicable; e.g., *Environmental Defense Fund* v. *TVA*, 339 F Supp. 806 (E.D..Tenn. 1972). Rather, I feel that this act, among others, indicates the attitude and spirit of congressional legislation relative to the environment.

program for the conservation, protection, restoration and propagation of selected species of native fish and wildlife, including migratory birds, that are threatened with extinction." 16 U.S.C. § 668aa.

> "(b) It is further declared to be the policy of Congress that the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Defense, together with the heads of bureaus, agencies, and services within their departments, shall seek to protect species of native fish and wildlife, including migratory birds, that are threatened with extinction, and, insofar as is practicable and consistent with the primary purposes of such bureaus, agencies and services, shall preserve the habitats of such threatened species on lands under the jurisdiction." 16 U.S.C. § 668aa(b).

This direction of Congress requires the Secretary to protect endangered species and to consider the effect that an exchange of land would have on such species.

It is contended that these purpose clauses impose no legal duty upon the Secretary. There are, however, some limits on the Secretary's action; otherwise, the statute would be infirm as an unconstitutional delegation of authority. If there are no standards by which it is possible to determine "whether the will of Congress has been obeyed," the delegation is too vague.

As the Supreme Court stated in *Stark* v. *Wickard*, 321 U.S. 288, 309-310 (1944):

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.

> The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

Section 668dd(b)(3) which exempts exchanges from certain statutory requirements is cited. Even though the exchange exemption has been broadened and applies only to the stated statutory objective (for example, he is obligated to consult with the Migratory Bird Conservation Commission), the exchange power is still subject to review under the general purpose clause of the statutes cited.

Since the administrative regulations do not detail the purposes for which exchanges may be made, the court must turn to the only guidelines available—the general purposes for which the various environmental statutes were enacted.

An agency may not exercise uncontrollable discretion—to hold otherwise would be to depart from those principles of government to which we have long adhered.

Since the Secretary may have chosen to act without regard to statutory standards, this court should require a trial to determine if the action was unlawful. To hold the cause unreviewable does not resolve the question of administrative discretion. It is precisely the function of the trial to determine if the Secretary did act within the powers granted him.

If the Secretary had chosen the wiser course and had held hearings and made findings, indicating the purposes and reasons for arriving at the decision that a nuclear power plant in the Navarre Marsh is not incompatible with the National Wildlife Refuge System, this court would not have to perform the task which the government now so strenuously opposes. It is this inquiry that must be made.

Plaintiffs allege that the Secretary acted without regard to the effect his action would have on birds and other endangered species which habitate Navarre Marsh. If this is so, the exchange must be set aside.

Defendants argue that even though the Secretary may have abused his discretion, his action is unreviewable even for abuse because it is "action committed to agency discretion." The Administrative Procedure Act (5 U.S.C. § 701) states that judicial review of agency action may be made except where "agency action is committed to agency discretion by law."

The Supreme Court has stated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967), that ". . . judicial review . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress" and that the Administrative Procedure Act "embodies the basic presumption of judicial review . . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion, . . ." and that the Act's "generous review provisions must be given a 'hospitable' interpretation."

Of prime importance is legislative intent. After careful study of the legislative history of these provisions, I can find no intent to preclude review. Although there is indication that the Secretary has wide discretion, there is no hint that the discretion is boundless, or not subject to review for abuse.

An analysis of cases involving agency actions that have been held unreviewable illustrates a pattern. The courts have held that cases which involve political questions, *United States* v. *Sisson*, 396 U.S. 812 (1969), questions concerning military matters, *Curran* v. *Laird*, 420 F.2d 122 (D.C.Cir. 1969), or matters involving administrative expertise, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), see also *Kletschka* v. *Driver*, 411 F.2d 436 (2nd Cir. 1969), are not reviewable.

Where, however, as here, the question is appropriate for court review because it involves matters suitable for judicial resolution, courts have not hesitated to review. As stated in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971):

> ". . . the Secretary's decision here does not fall within the exception for action 'committed to agency discretion.' This is a very narrow exception. Berger, *Administrative Arbitrariness and Judicial Review*, 65 Col. L. Rev. 55 (1965). The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

Here it is clear that there is law to apply. The question for trial is whether there are sufficient findings to support the conclusion that the Navarre Marsh can contain a nuclear power plant and still protect migratory birds—that the Navarre Marsh containing a nuclear power plant does not endanger birds or animals threatened with extinction. See 16 U.S.C. § 668aa(f).

The majority contend that regardless of any breach of duty by the Secretary, this action must be dismissed because of sovereign immunity, relying upon *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). This contention is not sound.

Larson involves a case where plaintiffs alleged that the Government breached its contract with the plaintiff. The Supreme Court held that the action was barred by sovereign immunity. The Court held that the sales agent had the power to construe the contract:

> "There is no allegation of any statutory limitation on his powers as a sales agent. In the absence of such a limitation he, like any other sales agent, had the power . . . to refuse delivery in cases in which

> he believed that the contract terms had not been complied with. His action in so doing in this case was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong and that title to the coal had, in fact, passed to the respondent under the contract." 337 U.S. at 703.

The principle enunciated in *Larson* only applies where an agent has authority to act but wrongfully under general contract or tort theory. It does not apply where the cause of action, as here, is based upon the Secretary's alleged failure to follow the statute:

> ". . . [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief." 337 U.S. at 689.

This teaching applies squarely to the case before us. Plaintiffs' cause of action rests on the language of the statute. It imposes a duty on the Secretary to consider environmental effects, and the effect on the wildlife system as a whole before he transfers land out of the system. If he has not done so his action is *ultra vires.*

The land exchange is prohibited if inconsistent with a "program for the conservation, protection, restoration and propagation of selected species of native bird and wildlife, including migratory birds, that are threatened with extinction." (16 U.S.C. § 668aa), or if it does not "seek to protect species of active bird and wildlife, including migratory birds, that are threatened with extinction." (16 U.S.C. § 668aa(b)). These are the statutory standards.

The majority contend that to allow this suit would stop the Government in its tracks. Perhaps, on a trial, that would be the result here. The courts have never hesitated to halt governmental action when it is illegal. The only party stopped, in fact, is not the Government, but the utilities, until it is determined by a trial that there is a balance between the congressional purpose of protecting our wildlife and our environment with our need for power. It is possible that a nuclear power plant can exist in the Navarre Marsh and not harm the environment or threaten wildlife. This must be ascertained, and if such is not possible, the Secretary acted without authority. Sovereign immunity cannot be used as a shield to prevent inquiry. If so, we will most certainly lose the fight to conserve and preserve our environment. The Executive Department of government cannot hide behind such an immunity. The utilities, too, should be interested in the inquiry involved in a trial. The American people yearn for solutions that would provide both additional power and a preserved environment. The utilities can make a great and continuing contribution by pointing the way.

If, as a result of a determination at trial that the exchange was made without a proper determination of the ecological effects, the transfer must be set aside. This would include return of the consideration for the exchange, the Darby Marsh, which was transferred to the Government. Defendants argue that this would violate the principles of sovereign immunity. This is not so. If as here the action is not barred by sovereign immunity, the form of remedy does not make it so. Once it is determined that the Government acted illegally, a court of equity has full power to restore the parties to the status quo ante. As stated in *Knox Hill Tenant Council* v. *Washington*, 448 F.2d 1045, 1052-53, (D.C. Cir. 1971),

"To the extent that sovereign immunity survives as an assurance that courts, rather than the Congress, will not dictate the disposition or utilization of property which belongs to all the people and which, with good reason in democratic theory, has been immemorially thought to reside under the legislative will, we find no threshold jurisdictional bar in the record before us. There is nothing new about judicial entertainment of suits which charge that federal officials are acting outside of, or in conflict with, the responsibilities laid upon them by the Congress or the Constitution. Whether such charges are true, and, if so, what remedial action the court should or may direct, are questions partaking of the merits, and not of jurisdiction to explore the merits.

"If, after trial, it be found that appellees do in fact have a responsibility for the property in their care which they are not recognizing adequately, the court's power, at the least, to declare that responsibility and to define that default is not dissipated solely by the circumstances that legal title to the property is in the United States. To hold otherwise would be to say that sovereign immunity forecloses any judicial inquiry whatsoever into the custodianship by a federal official of federal property. There is no magic about real estate, or its ownership by the United States, which hedges its guardians about with an immunity not available to other executants if public policies committed to their care by the Congress."

To the same effect, *Bob Jones University* v. *Connally*, 341 F. Supp. 277, 284 (D.S.C. 1971):

"It has long been recognized that the sovereign cannot act illegally or unconstitutionally and, therefore, if an act or threatened action is unconstitutional or illegal it is not the action of the sovereign and such acts or threatened acts can be enjoined."

The same principals apply here.

For my brother Judge McCree, sovereign immunity stands as a bar. I respectfully disagree. In his 1970 Supplement to *Administrative Law Treatise*, Professor Davis says (Section 27.00-4, p. 905):

> "Sovereign immunity often produces an uncivilized result, because what counts—what determines who gets the property, for instance—is not reason but force, not law but power, not orderly adjudication but physical taking by the stronger party, not refinements the sum of which we call civilization but crudities that are sometimes characteristic of primitive men."

Professor Davis continues as page 906:

> "A thoughtful district judge recently said that sovereign immunity 'rests either on the theory that the United States is the institutional descendant of the Crown and enjoys its immunity or on a metaphysical doctrine that there can be no legal right as against the authority that makes the law.' [30]"

Accordingly, I would reverse the dismissal (granted on motion) and require the cause to proceed to trial. Plaintiffs, as a matter of law, have the burden of proof, but the vital requirement—the inquiry, in court, to determine whether here there is a balance between competing interests—is essential.

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[30] Martyniuk v. Pennsylvania, 282 F.Supp. 252, 255 (E.D. Pa. 1968).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1940

[Filed Sep. 22, 1972, James A. Higgins, Clerk]

SIERRA CLUB and CITIZENS FOR CLEAN AIR AND WATER,
Plaintiffs-Appellants,

v.

WALTER J. HICKEL, individually and as Secretary of the Interior, DEPARTMENT OF THE INTERIOR, PETER A. MORRIS, THE TOLEDO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Defendants-Appellees.

Before: WEICK and MCCREE, Circuit Judges, and FEIKENS, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendants-appellees recover from plaintiffs-appellants the costs on appeal, as itemized

below, and that execution therefor issue out of said District Court.

Entered by order of the
Court

/s/ James A. Higgins
Clerk

A True Copy
Attest:

JAMES A. HIGGINS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 71-1940 and -1941

[Filed Oct. 26, 1972, James A. Higgins, Clerk]

SIERRA CLUB, ET AL.,
Plaintiffs-Appellants
and Cross-Appellees.

vs.

WALTER J. HICKEL, ETC., ET AL.,
Defendants-Appellees
and Cross-Appellants.

ORDER

Before WEICK and MCCREE, Circuit Judges, and FEIKENS,* District Judge.

The motion for a rehearing in banc has been treated as a petition for rehearing with a suggestion that it be heard in banc. Rule 35, Fed. R.App.P. No member of the panel or active Judge requested that a vote be taken on said suggestion; the petition for rehearing was considered by the panel, and it is hereby denied. Judge Feikens dissents.

ENTERED BY ORDER OF THE
COURT

/s/ James A. Higgins
Clerk

---

* The Honorable John Feikens, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX B

APPLICABLE STATUTES AND REGULATIONS

1. Administration of National Wildlife Refuge System, 16 U.S.C. 668dd

§ 668dd. National Wildlife Refuge System.

(a) Designation; public land withdrawals; disposal of acquired lands; proceeds.

For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary of the Interior for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administred by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System"), which shall be subject to the provisions of this section. Nothing contained in this Act shall restrict the authority of the Secretary to modify or revoke public land withdrawals affecting lands in the System as presently constituted, or as it may be constituted, whenever he determines that such action is consistent with the public interest. No acquired lands which are or become a part of the System may be transferred or otherwise disposed of under any provision of law (except by exchange pursuant to subsection (b)(3) of this section) unless (1) the Secretary of the Interior determines after consultation with the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established, and (2) such lands are transferred or otherwise disposed of for an amount not less than (A) the acquisition costs of such lands, in the

case of lands of the System which were purchased by the United States with funds from the migratory bird conservation fund, or (B) the fair market value of such lands (as determined by the Secretary as of the date of the transfer or disposal), in the case of lands of the System which were donated to the System. The Secretary shall pay into the migratory bird conservation fund the aggregate amount of the proceeds of any transfer or disposal referred to in the preceding sentence.

(b) Administration; public accommodations contracts; acceptance and use of funds; exchange of properties; cash equalization payments.

In administering the System, the Secretary is authorized—

(1) to enter into contracts with any person or public or private agency through negotiation for the provision of public accommodations when, and in such locations, and to the extent that the Secretary determines will not be inconsistent with the primary purpose for which the affected area was established.

(2) to accept donations of funds and to use such funds to acquire or manage lands or interests therein, and

(3) to acquire lands or interests therein by exchange (a) for acquired lands or public lands under his jurisdiction which he finds suitable for disposition, or (b) for the right to remove, in accordance with such terms and conditions as the Secretary may prescribe, products from the acquired or public lands within the System. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

* * * *

2. Endangered Species Conservation Act of 1969, 16 U.S.C. 668aa *et seq.*

§ 668aa. Congressional findings, declaration of policy, and statement of purposes; endangered species; publication in Federal Register; "fish and wildlife" defined.

(a) The Congress finds and declares that one of the unfortunate consequences of growth and development in the United States has been the extermination of some notive species of fish and wildlife; that serious losses in other species of native wild animals with eduational, historical, recreational, and scientific value have occurred and are occurring; and that the United States has pledged itself, pursuant to migratory bird treaties with Canada and Mexico and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, to conserve and protect, where practicable, the various species of native fish and wildlife, including game and nongame migratory birds, that are threatened with extinction. The purposes of this Act are to provide a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife, including migratory birds, that are threatened with extinction.

(b) It is further declared to be the policy of Congress that the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Defense, together with the heads of bureaus, agencies, and services within their departments, shall seek to protect species of native fish and wildlife, including migratory birds, that are threatened with extinction, and, insofar as is practicable and consistent with the primary purposes of such bureaus, agencies, and services, shall preserve the habitats of such threatened species on lands under their jurisdiction.

(c) A species of native fish and wildlife shall be regarded as threatened with extinction whenever the Secre-

tary of the Interior finds, after consultation with the affected States, that its existence is endangered because its habitat is threatened with destruction, drastic modification, or severe curtailment, or because of overexploitation, disease, predation, or because of other factors, and that its survival requires assistance. In addition to consulting with the States, the Secretary shall, from time to time, seek the advice and recommendations of interested persons and organizations including, but not limited to, ornithologists, ichthyologists, ecologists, herpetologists, and mamalogists. He shall publish in the Federal Register the names of the species of native fish and wildlife found to be threatened with extinction in accordance with this subsection.

(d) For the purpose of sections 668aa through 668cc of this title, the term "fish and wildlife" means any wild mammal, fish, wild bird, amphibian, reptile, mollusk, or crustacean. (Pub. L. 89-669, § 1, Oct. 1, 1966, 80 Stat. 926; Pub. L. 91-135, § 12(a), (e), Dec. 5, 1969, 83 Stat. 282, 283.)

§ 668bb. Powers and duties of Secretary of Interior.

* * * *

(d) Administrative review and utilization of other programs; encouragement of, consultations with, and assistance to other Federal agencies for carrying out endangered species program; appropriations for acquisition of privately owned areas.

The Secretary shall review other programs administered by him and, to the extent practicable, utilize such programs in furtherance of the purpose of this Act. The Secretary shall also encourage other Federal agencies to utilize, where practicable, their authorities in furtherance of the purpose of this Act and shall consult with and assist such agencies in carrying out endangered spe-

cies program. The Secretary is authorized to acquire by purchase, donation, exchange, or otherwise any privately owned land, water, or interests therein with the boundaries of any area administered by him, for the purpose of conserving, protecting, restoring, or propagating any selected species of native fish and wildlife that are threatened with extinction and each such acquisition shall be administered in accordance with the provisions of law applicable to such area, and there is authorized to be appropriated annually for fiscal years 1970, 1971, and 1972 not to exceed $1,000,000 to carry out the provisions of this sentence. (Pub. L. 89-669, § 2, Oct. 15, 1966, 80 Stat. 926; Pub. L. 91-135, § 12(b), (c), Dec. 5, 1969, 83 Stat. 282.)

3. Preservation of Game and Wild Birds, 16 U.S.C. 701

§ 701. Game and wild birds; preservation.

The duties and powers of the Department of the Interior include the preservation, distribution, introduction, and restoration of game birds and other wild birds. The Secretary of the Interior is authorized to adopt such measures as may be necessary to carry out the purposes of this section and section 667e of this title, and to purchase such game birds and other wild birds as may be required therefor, subject, however, to the laws of the various States and Territories. The object and purpose of this section and section 667e of this title, is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed.

The Secretary of the Interior shall from time to time collect and publish useful information as to the propagation, uses, and preservation of such birds.

And the Secretary of the Interior shall make and publish all needful rules and regulations for carrying out the purposes of said sections, and shall expend for said purposes such sums as Congress may appropriate therefor. (May 25, 1900, ch. 553, § 1, 31 Stat. 187; 1939 Reorg. Plan No. II, § 4(f), eff. July 1, 1939, 4 F. R. 2731, 53 Stat. 1433.)

4. Fish and Wildlife Act of 1956, 16 U.S.C. 742a

§ 742a. Declaration of policy.

The Congress declares that the fish, shellfish, and wildlife resources of the Nation make a material contribution to our national economy and food supply, as well as a material contribution to the health, recreation, and well-being of our citizens; that such resources are a living, renewable form of national wealth that is capable of being maintained and greatly increased with proper management, but equally capable of destruction if neglected or unwisely exploited; that such resources afford outdoor recreation throughout the Nation and provide employment, directly or indirectly, to a substantial number of citizens; that the fishing industries strengthen the defense of the United States through the provision of a trained seafaring citizenry and action-ready fleets of seaworthy vessels; that the training and sport afforded by fish and wildlife resources strengthen the national defense by contributing to the general health and physical fitness of millions of citizens; and that properly developed, such fish and wildlife resources are capable of steadily increasing these valuable contributions to the life of the Nation.

The Congress further declares that the fishing industry, in its several branches, can prosper and thus fulfill its proper function in national life only if certain fundamental needs are satisfied by means that are consistent

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with the public interest and in accord with constitutional functions of governments. Among these needs are:

(1) Freedom of enterprise—freedom to develop new areas, methods, products, and markets in accordance with sound economic principles, as well as freedom from unnecessary administrative or legal restrictions that unreasonably conflict with or ignore economic needs;

(2) Protection of opportunity—maintenance of an economic atmosphere in which domestic production and processing can prosper; protection from subsidized competing products; protection of opportunity to fish on the high seas in accordance with international law;

(3) Assistance—assistance consistent with that provided by the Government for industry generally, such as is involved in promoting good industrial relations, fair trade standards, harmonious labor relations, better health standards and sanitation; and including, but not limited to—

(a) services to provide current information on production and trade, market promotion and development, and an extension service.

(b) research services for economic and technologic development and resource conservation, and

(c) resource management to assure the maximum sustainable production for the fisheries.

The Congress further declares that the provisions of sections 742a to 742d, and 742e to 742j of this title are necessary in order to accomplish the objective of proper resource development, and that such sections shall be administered with due regard to the inherent right of every citizen and resident of the United States to engage

in fishing for his own pleasure, enjoyment, and betterment, and with the intent of maintaining and increasing the public opportunities for recreational use of our fish and wildlife resources, and stimulating the development of a strong, prosperous, and thriving fishery and fish processing industry. (Aug. 8, 1956, ch. 1036, § 2, 70 Stat. 1119.)

5. Interior Department, Public Lands Regulations

43 C.F.R. 2204—Approval of Exchange and Subsequent Action

* * * *

§ 2204.2 Right to reject.

§ 2204.2-1 Basis for denial.

An application may be rejected at any time prior to the issuance of patent or other instrument of transfer. Exchanges will not be consummated, in the discretion of the authorized officer when, for example, after public notice—

(a) An appropriate public requirement for the selected property is identified, or

(b) Information is received which establishes that the exchange is not in the public interest.

6. Administrative Procedure Act, 5 U.S.C. 706

§ 706 Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

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(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.

APPENDIX C

LAND EXCHANGE STATISTICS

Various agencies of the federal government have engaged in the following land exchanges during the past five to ten years:

I. National Wildlife Refuge System, administered by the Bureau of Sports Fisheries and Wildlife

Fiscal Year	Number of * Exchanges	Acreage Acquired	Acreage * Divested
1960		1,587	
1961		348	
1962		853	
1963		1,618	
1964		1,086	
1965		3,587	
1966		3,050	
1967		2,302	
1968		9,392	
1969	8	1,148	1,069
1970	14	3,772	3,243
1971	17	2,096	2,134
1972	7	1,551	1,643

* Statistics only available for the past four years.

Source: Approximate figures supplied by the Division of Realty, Bureau of Sports Fisheries and Wildlife, U.S. Department of the Interior.

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II. National Park Service

Fiscal Year	Number of Exchanges	Nonfederal acreage Acquired	Appraised or * Estimated Value	Federal Land Exchanged	Appraised or * Estimated Value
1961	9	920.07	148,190.00	481.94	127,350.00
1962	17	4,408.39	248,089.00	4,786.13	89,312.00
1963	19	10,669.22	193,083.00	2,454.07	37,747.00
1964	35	4,007.05	1,533,507.00	9,725.02	1,473,972.00
1965	19	29,872.05	1,742,706.00	28,718.07	1,368,795.00
1966	10	3,511.01	818,200.00	4,944.71	806,400.00
1967	7	8,635.39	67,953.00	2,163.42	67,894.00
1968	14	4,481.92	924,475.00	4,952.74	1,049,225.00

* Appraised or Estimated Value not available for a few of the parcels acquired or exchanged.

Source: Realty Office, National Park Service, U.S. Department of Interior (statistics since 1968 not available).

III. Forest Service

Fiscal Year	Number of Exchanges	Offered		Selected	
		Acres	Value	Acres	Value
1965	105	62,616.70	10,611,078.43	42,758.13	9,625,812.07
1966	128	166,190.24	16,097,778.70	148,650.79	15,347,763.18
1967	158	91,792.80	13,504,252.24	74,044.93	12,337,534.58
1968	122	53,296.78	5,792,111.00	51,932.47	5,268,699.00
1969	169	90,872.40	26,091,038.14	65,954.74	24,469,927.15
1970	161	80,150.51	16,455,470.85	53,042.65	15,289,046.40
1971	182	88,396.93	29,803,874.00	62,301.99	27,631,685.00
1972	145	99,814.16	25,789,244.00	66,225.18	24,310,008.00

Source: Director of Lands, Forest Service, U.S. Department of Agriculture.

IV. Bureau of Land Management

Fiscal Year	Number of Exchanges	Acreage Received	Acreage Exchanged
1966	181	335,392.63	384,593.19
1967	199	216,557.27	254,239.13
1968	202	261,019.92	349,128.78
1969	253	332,581.40	327,141.88
1970	212	174,076.77	190,117.02
1971	209	196,770.65	191,676.34

Sources: U.S. Department of the Interior, Public Land Statistics; 1966/Table 24, p. 54; 1967/Table 24, p. 54; 1968/Table 24, p. 54; 1969/Table 26, p. 52; 1970/Table 26, p. 52; 1971/Table 26, p. 54.

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APPENDIX D

OTHER LAND EXCHANGE STATUTES

The following statutes provide authority to make land exchanges in addition to those in Appendix B relating to the National Wildlife Refuge System:

I. National Park Service of the Department of Interior

A. [16 U.S.C. 51] Yosemite National Park; exchange of privately owned lands in park

The Secretaries of the Departments of Interior and Agriculture, for the purpose of eliminating private holdings within the Yosemite National Park and to preserve intact timber along and adjoining the roads in the scenic portion of the park on patented lands, are empowered in their discretion to obtain and accept for the United States complete title to any and all patented lands within the boundaries of said park by the exchange of timber or timber and lands within the Yosemite National Park and the Sierra and Stanislaus National Forests for such lands and timber thereon within the park, necessary conveyances of park and national forest timber or timber and lands to be made by said secretaries, respectively. The secretaries of the said departments are authorized to acquire title in fee by the exchange of lands of the United States for patented lands not exceeding six hundred and forty acres in the Sierra and Stanlislaus National Forests, adjacent and contiguous to the Yosemite National Park, and when such patented lands are thus acquired, said lands shall become a part of the Yosemite National Park and be subject to all

the provisions of sections 55, 61, 471c and 471d of this title.

B. [16 U.S.C. 430g-2] Gettysburg National Military Park; exchange of lands.

The Secretary of the Interior is authorized to have competent and disinterested appraisals made as to the value of not more than twenty-three acres of land in Gettysburg National Military Park, in the state of Pennsylvania, such land lying generally between East Confederate Avenue and Wainwright Avenue, and being situated adjacent to the present high-school property in that area. Upon the basis of such appraisals, the Secretary is authorized to convey such property for public-school purposes to the State of Pennsylvania, or the appropriate local agency thereof, the conveyance to be made in exchange for non-Federal land of approximately equal value, which land, upon acceptance by the United States, shall become a part of Gettysburg National Military Park.

II. Forest Service of the Department of Agriculture:

[7 U.S.C. 1011] Powers of Secretary of Agriculture

To effectuate the program provided for in section 1010 of this title, the Secretary is authorized—

* * * *

(c) To sell, exchange, lease, or otherwise dispose of, with or without a consideration, any property so acquired, under such terms and conditions as he deems will best accomplish the purposes of sections 1010-1013 of this title, but any sale, exchange, or grant shall be made only to public authorities and agencies and only

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on condition that the property is used for public purposes: *Provided however,* That an exchange may be made with private owners and with subdivisions or agencies of State governments in any case where the Secretary of Agriculture finds that such exchange would not conflict with the purposes of sections 1001-1005d, 1006, 1006c-1006e, 1007, and 1008-1029 of this title, and that the value of the property received in exchange is substantially equal to that of the property conveyed.

III. Bureau of Land Management of the Department of Interior:

A. [16 U.S.C. 485] Exchange of lands in national forests; cutting timber in national forests in exchange for lands therein.

When the public interests will be benefited thereby, the Secretary of the Interior is authorized in his discretion to accept on behalf of the United States title to any lands within the exterior boundaries of the national forests which, in the opinion of the Secretary of Agriculture, are chiefly valuable for national-forest purposes, and in exchange therefor may patent not to exceed an equal value of such forest land, in the same State, surveyed and non-mineral in character * * * *.

B. [43 U.S.C. 315g] Acceptance of donations of land; exchange of lands; notice of contemplated exchange; reservation of minerals; easements or rights of use; fee for exchange.

(b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately

owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

IV. Other federal statutes that include authority to make land exchanges are:

16 U.S.C. 21c
38
45a-2
52
79c and 79e
81k, 81l, and 81m
90b and 90b-1
111b
160b and 160e
164
192b-1 and 192b-6
206
221c
241b and 241f
243
251b
271a
282
283
343c-343c-4
346 and 346a-3
361f
392
398d
402
403-2 and 403g-1

16 U.S.C. 407f
407m-7
410o and 410q
410y-1(b)
430g-1
441i, 441l, and 441n
444 and 444a
450d-1 and 450bb-4(b)
483
674b
678
689d
696
715d
718d(c)
1134(a)
1246(d)-1246(f)
1277(d)

25 U.S.C. 463e
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In the
Supreme Court of the United States

October Term, 1972

No. 72-1005

SIERRA CLUB AND CITIZENS FOR
CLEAN AIR AND WATER,
Petitioners

v.

ROGERS C. B. MORTON,
SECRETARY OF INTERIOR, ET AL.,
Respondents

BRIEF OF THE TOLEDO EDISON COMPANY AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATEMENT

A complete statement of the facts is given here to show that there are no special or important reasons why certiorari should be granted in this case brought by petitioners. The facts standing alone show that the trans-

action involved herein need not occupy the time of this Court or any further time of the courts below.

In 1968, The Toledo Edison Company and The Cleveland Electric Illuminating Company, two electric utilities serving northern Ohio, acquired a privately owned 480-acre tract in Ottawa County, Ohio, along Lake Erie, known as the Darby Marsh. The United States in 1967 had acquired a formerly privately owned tract known as the Navarre Marsh, in the same county, consisting of about 455 acres of marshland and about 77 acres in one corner consisting mostly of upland. (A. 18a-19a)

The following land exchange took place between the utilities and the United States in the fall of 1968 (A. 19a):

The utilities received:

(1) Title to the Navarre Marsh (roughly 77 acres of mostly upland and 455 acres of mostly marshland).

The United States received:

(1) Title to the Darby Marsh (about 480 acres to be used as a wildlife refuge).

(2) The right under a rent-free lease to continue to use the entire 455 acres of marshland of the Navarre Marsh as a wildlife refuge for 50 years, except for a strip for a water channel (including buried intake and discharge pipes) and a reservation for facilities such as transmission lines, which by reason of the location of the marsh and the areas to be served by the utilities would probably affect very little, if any, of the land. Some service roads were required by the United States for wildlife management use.

(3) The right under a rent-free lease to use marshland adjacent to Navarre Marsh (135 acres) as a wildlife refuge for 25 years.

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(4) The utilities would spend up to $175,000 to rebuild 3,200 feet of dike on the Darby property and maintain the dikes on the Navarre Marsh.

(5) The utilities at their expense would install three electric pumps at the Navarre Marsh to maintain proper water levels for wildlife refuge management.

The utilities thereafter proceeded with site preparation and later commenced construction of the Davis-Besse nuclear generating plant on the upland portion of the Navarre property and on adjacent land. Petitioners' amended complaint in this case attacking this exchange was filed in April of 1971 (almost two and a half years after the exchange). In order to complete the plant on schedule, to be able to serve the needs of the population in their service area and the commerce and industry dependent upon them for electric power, the utilities have felt compelled to continue to expend large sums in continuing the construction of the plant.

The Atomic Energy Commission is conducting an investigation of the environmental effects of the plant and hence this aspect of the plant location and construction has been and will be taken into account. (AEC Docket No. 50-346). The rules of that agency give organizations such as petitioners the right to intervene in environmental hearings and present evidence on that subject.

In summary, before the exchange the United States had about 455 acres of marshland (plus about 77 acres of mostly upland) for use as a wildlife refuge and the utilities had a 480-acre marshland tract (with some upland) for use in the construction of a nuclear generating plant. After the exchange the United States had the use of over 1,000 acres of marshland (including the same marsh exchanged) for wildlife refuge purposes along with a free new dike and pumps, and the utilities had 77

acres of upland (plus adjacent land purchased by the utilities from private persons) on which to build their plant, the environmental effects of which are being taken into account by the Atomic Energy Commission, the governmental body having jurisdiction over such projects.

While it is the position of the utilities that the decision of the United States Court of Appeals for the Sixth Circuit is clearly correct as a matter of law, even if it were not, the foregoing facts show that there are no special or important reasons why certiorari should be granted in this case, and justice and the welfare of the public will be served by denying the petition.

II

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. Summary of Argument

The substance of petitioners' complaint in the district court was that even though the Secretary of the Interior had broad power to exchange lands which he found suitable, the exchange should be set aside in spite of the fact that it nearly doubled the marsh refuge area in the same county. They claimed building an atomic plant adjacent to the Navarre Marsh rather than adjacent to the Darby Marsh (both of which continue as wildlife refuges) would not foster the *general wildlife conservation goals* of his office. Respondents assert that if this type of claim by an environmental group, two and a half years after the exchange, were held to state a cause of action, it would render the exchange statute meaningless as no purchaser could ever tell in advance if he had secured a good title. Congress did not intend to do a frivolous thing in passing the statute. The situation is different from ascertaining if specific conditions precedent had been complied with by

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a government official. Petitioners' allegations did not state a cause of action and justice is served by the circuit court's decision.

The circuit court's decision that sovereign immunity protected this exchange does not require review by this Court. One of the most narrow and well established applications of the doctrine is involved in this case, *i.e.* that relief could not be granted by merely ordering the cessation of conduct complained of, but would require affirmative action by the sovereign in the disposition of unquestionably sovereign property. Modern recognition of the applicability of this rule is found in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948); *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 373 U.S. 609 (1963), and *Malone v. Bowdoin*, 369 U.S. 643 (1962).

Even though petitioners only ask that the utilities return the title to the land they received, well established principles of law recognized by this Court, the Ohio Supreme Court and numerous other courts require that if the exchange is set aside the Government would also have to reconvey to the utilities the land it received. Hence the forced conveyance of unquestionably sovereign property would result.

An additional reason for the applicability of sovereign immunity to this case is that the acts of the Secretary here did not come within the *ultra vires* exception to the rule. He had broad discretionary general authority to make the exchange without any specific conditions precedent. Whether or not the exchange was desirable or undesirable in fostering his general goals did not make it an *ultra vires* act. This case differs from *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). There the statute *prohibited* the act of the official *unless* certain *conditions precedent* were complied with. If he failed to do so, his acts were *ultra vires*. Also the relief there could be granted by ordering the cessation of con-

duct and did not require the disposition of unquestionably sovereign property.

Petitioners rely on cases involving construction of rights of grantees in federal land for mining, grazing and the like. This line of cases is distinguishable as it is based on the concept that due process and the statute giving the grantee rights in federal lands gives him the right to protect such a grant as against the Government itself. There are no such factors here.

The claim of petitioners that this Court should review this case because there is a conflict among the Federal Courts of Appeals as to the effect of the Administrative Procedure Act on the doctrine of sovereign immunity is not justified. This Court in *Blackmar v. Guerre,* 342 U.S. 512 (1952), recognized that the Administrative Procedure Act should not be deemed an implied waiver of all governmental immunity from suit. Any conflict among the circuits is one of language rather than of substance, as those cases which speak of waiver would come within the *ultra vires* exception to immunity anyway. Even more important, there is no case holding that the Administrative Procedure Act waived immunity in a case such as this where relief could not be granted by merely ordering cessation of conduct but affirmative action of the sovereign would be required in the disposition of unquestionably sovereign property.

There clearly are no special and important reasons for granting certiorari. The utilities acted in good faith in relying on the broad general authority of the Secretary to make the exchange and, after having deemed it necessary to spend millions of dollars to serve the public in reliance thereon, should not be harassed with further proceedings in this case.

B. The Amended Complaint Did Not State a Cause of Action.

The statute pursuant to which this exchange of land was made would be rendered virtually meaningless if construed as advocated by petitioners. If one securing title from the United States under a statute such as in this case, giving the Secretary of the Interior the power to exchange land "which he finds suitable for disposition" (16 *U.S.C.* § 668(b)(3)), could have his title defeated two and a half years after he acquired it by a claim that the Secretary's determination was not a wise one in carrying out the general duties and goals of his office, no one could ever risk making such an exchange. No lawyer could ever approve such a title. Congress would have done a frivolous and futile thing in passing the exchange statute.

Where there are *specific statutory conditions precedent* to a government officer performing an act (such as conveying land), a prospective purchaser can protect himself in advance by checking to see that they have been complied with. If they have not, the transaction can be attacked. However, where as here, the only requirement is that he "finds it suitable for disposition", there would be no way in which a purchaser could make a determination on which he can base a good title. He cannot guess in advance if the transaction would be held by a third person to tip the scales more on the desirable side than on the undesirable side in carrying out the general conservation duties of the Interior Department. To take title away from a purchaser under such circumstance would not be consistent with the most rudimentary principles of justice or reason.

The decision of the district court in dismissing the amended complaint and the affirmance of that decision by the appellate court achieved a just and proper result, as no cause of action was stated by allegations that the

exchange did not foster the general goals of the Secretary set forth in the statute.

C. The Decision In This Case Does Not Involve A Question of Law Which Has Not Been Settled By This Court, And It Is Not In Conflict With a Decision of This Court or Any Other Federal Court of Appeals.

1. Sovereign Immunity

(a) Affirmative Action In Disposing of Sovereign Property

The factual situation in this case does not require a new decision by this Court on the doctrine of sovereign immunity. It clearly falls within the most well established and narrowest application of the doctrine, as set forth in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948):

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22 (1890)."
>
> 337 U.S. 682, footnote 11 at 691
> (Emphasis added.)

The rule was again recognized and applied in *Hawaii v. Gordon*, 373 U.S. 57 (1963):

> "° ° ° We have concluded that this is a suit against the United States and, absent its consent, cannot be maintained by the State. The general rule is that relief sought nominally against an officer is in fact against the sovereign, if the decree would operate against the latter. E.g., *Dugan v. Rank*, 372 U.S. 609 (1963); *Ma-*

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lone v. Bowdoin, 369 U.S. 643 (1962), *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949). Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and *cause as well the disposition of property admittedly belonging to the United States.*"

337 U.S. 57, 58
(Emphasis added.)

It was also applied in *Dugan v. Rank*, 373 U.S. 609 (1963), and in *Malone v. Bowdoin*, 369 U.S. 643 (1962).

It is apparent from the allegations of the complaint that the United States is now the owner in fee simple of the Darby Marsh and of a lease on most of the Navarre Marsh and adjoining marshland. There is no contest as to its present ownership. However, if the exchange were held illegal and set aside as requested, the foundation on which the Government's title rests would fall and its title would be destroyed. Equity would require the Court to order its reconveyance. This elementary proposition of logic and law has long been recognized by this Court, the Supreme Court of Ohio and other courts. In *Chapman v. County of Douglas*, 107 U.S. 348 (1882), a governmental body (a county) was held obligated to reconvey property acquired by an unauthorized contract. The same was held as to property received in an exchange of lands in *Stevens v. McCoy*, 60 Ohio St. 540 (1899), and the general recognition of the rule by other courts is set forth in 30 *Am. Jur.* 2d, *Exchange of Property*, Section 41:

"° ° ° No action for rescission of a contract of exchange of property is maintainable unless the party seeking the recission restores, or offers to restore, the other party to its original position by returning, or offering to return, whatever land, personalty or other property he may have received on the exchange from the other party."

This Court also recognized the applicable equity rule in *Rice & Adams v. Lathrop*, 278 U.S. 509 (1929):

> "° ° ° This conclusion finds support in the principle that 'a court of equity ought to do justice completely and not by halves,' and to this end, having properly acquired jurisdiction of the cause for any purpose, it will ordinarily retain jurisdiction for all purposes, including the determination of legal rights that otherwise would fall within the exclusive authority of a court of law. ° ° °"
>
> 278 U.S. 509 at 515

This doctrine was applied in *Katchen v. Landy*, 382 U.S. 323 (1966) at page 338. Equitable rules have long been recognized to apply to the United States, *U.S. v. Detroit Timber and Lumber Co.*, 200 U.S. 321 (1906), and *Jacobs v. U.S.*, 239 F.2d 459 (4th Cir. 1956), *cert. denied* 353 U.S. 904 (1957).

This is not a case where the utilities claim property was taken from them by the Government, giving rise to a claim for just compensation in the Court of Claims, as asserted by petitioners (Pet. 9). The utilities' claim to title is one based on a valid exchange of lands.

As this Court held in *Larson v. Domestic & Foreign Commerce Corp., supra.*, 337 U.S. 682 (1949), the question of whether or not the suit is against the sovereign is not determined by the form of the relief sought (here claimed only to be against the utilities), but whether it is "° ° ° in substance, a suit against the Government, over which the Court in the absence of consent has no jurisdiction." (at 687-688). Here the exchange itself is attacked and the substance is such that if the relief sought were to be granted it would require affirmative action by the sovereign and the disposition of unquestionably sovereign property, and hence the doctrine of sovereign immunity was properly applied.

Recent cases supporting the application of the doctrine of sovereign immunity to the instant case, where this Court

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denied certiorari, are: *Simmonds v. Vinson*, 394 F.2d 732 (5th Cir. 1968), *cert. denied* 393 U.S. 968 (1968), and *Switzerland Co. v. Udall*, 337 F.2d 56 (4th Cir. 1964), *cert. denied* 380 U.S. 914 (1965).

(b) Ultra Vires Exception to Sovereign Immunity

There are, of course, many cases where a federal official exceeds his authority and affirmative action in disposing of sovereign property is not involved, *i.e.*, the *ultra vires* exception to sovereign immunity. This Court recognized such an exception in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1948), discussed above:

> "* * * On a similar theory, where the officer's powers are *limited by statute*, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, *only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.* * * *"*
>
> 337 U.S. 682, at 689-690
> (Emphasis added.)

This *ultra vires* exception to sovereign immunity is not applicable to the instant case. The Secretary was given the clearest and broadest possible authority by the language of 16 *U.S.C.* § 668dd(b)(3) to exchange lands "which he finds suitable". There were no express conditions precedent which had to be complied with. An analogous broad delegation of authority to the Postmaster General was claimed to be exercised in a manner which was "unlawful, arbitrary and capricious" and "in violation of Executive Order No. 10988", which outlined his *general powers and goals*,

in the case of *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 454, 455 (D.C. Cir. 1965), *cert. denied* 382 U.S. 978 (1966). The complaint was dismissed because of sovereign immunity and it was held that "an officer of the United States does not act outside his authority whenever he acts upon an erroneous decision of law or fact if he is empowered to make the decision." (350 F.2d 456)

The court of appeals decision in the case at bar is not inconsistent with the case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), as claimed by petitioners. (Pet. 9). The question of sovereign immunity was not raised or decided in that case, but it is apparent that it would not have affected the result if it had been. The action was for an injunction against the Secretary of Transportation to enjoin him from releasing federal funds for the construction of a highway through a park and also to enjoin the Tennessee Highway Commissioner from building this segment of the highway with such funds.

The allegation was that the Secretary had failed to comply with two express conditions precedent required before approving such use of federal funds, *i.e.*, a proper determination if a feasible and prudent alternative route existed and, if none, then that all possible planning had been done to minimize harm to the park. These allegations clearly brought the case within the *ultra vires* exception to the doctrine of sovereign immunity. The Secretary was expressly forbidden by statute to release funds for this purpose unless he had complied with these conditions and if he failed to do so he was acting outside of his authority and such *ultra vires* action could not be protected by sovereign immunity. The relief sought could be granted by merely ordering the cessation of the conduct (disbursing the funds) and no affirmative action of the sovereign was required in disposing of unquestionably sovereign property.

The action of the Tennessee Commissioner was also tied in with building the road with federal funds which were not properly authorized. There was no attempt to secure an order specifically requiring him to dispose of state property. The relief sought was only to prevent him from improperly receiving federal funds to develop such property.

In the case at bar the statute did not specify any express conditions precedent and hence there was no *ultra vires* act. The relief requested would not order the cessation of the illegal use of federal funds in developing property but would require affirmative action by the sovereign in disposing of the title. Hence this case is clearly distinguishable from *Overton*.

Littel v. Morton, 445 F.2d 1207 (4th Cir. 1971) (Pet. 10, 17), was a case falling in the category of a government official acting beyond the authority specifically imposed upon him, in denying a lawyer's claim to fees for services performed for an Indian tribe.

Another such case is *National Forest Preservation Group v. Batz*, 343 F. Supp. 696 (D. Mont. 1972) (Pet. 13, 14), where plaintiffs sought to *enjoin* a conveyance by the Government and claimed a failure on the part of the government official to perform specific acts required of him under the laws and regulations relating to the type of exchange in question. The court concluded that there were no such violations which were prejudicial and that plaintiffs' dissatisfaction with the exchange was not a ground for setting aside the decision of the Secretary of Agriculture.

The case of *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C. Cir. 1971), cited at page 11 of the petition, is also not analogous. The court points out that the federal statute specifically required the officials to maintain decent, safe and sanitary dwellings; they were required to police the performance of contracts for this purpose, and

had specific authority to deal with violations. The court held that the allegations of the complaint were sufficient to charge the officials with acting *outside of their specific authority* and that the relief sought *would not interfere with the Government's title or possession of the properties.* Thus the court states at page 1052:

> "° ° ° In neither purpose nor effect will the prosecution of this suit disturb or diminish either the Government's title or its possession. ° ° °"

The mere fact that the Government owned the property was in itself not enough to bar the suit. It was a question of carrying out specific duties in regard to the properties. In the case at bar the effect of the suit would be to affect the *title and possession* of government owned property; it does not merely relate to management thereof.

Assertions by petitioners at pages 12, 13 and 14 of the petition in regard to other land exchanges by the Government which are not a part of the record of this proceeding have no relevancy whatsoever. The only exchange involved in this suit is the one described in the Statement of Facts at the beginning of this brief, which clearly does not present a special or important reason for granting certiorari.

(c) Cases Construing Government Grants

Petitioners rely heavily on a line of cases in federal courts determining claims of parties relating to their rights in federal lands, such as mining, homestead, grazing and forestry. It is concluded that these cases illustrate the right of the courts to make determinations in regard to federal lands. However, this line of cases is completely distinguishable from the case at bar. They are based on the concept that the statute giving the grantee rights in federal lands gives him a right to protect such a grant against the sovereign itself. He has a right to have a court determination of the validity of his rights.

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Thus in the case of *Coleman v. U.S.*, 363 F.2d 190 (9th Cir. 1966), cited at page 10 of the petition, the court states at page 196:

> "It has long been established that a qualified entryman upon public lands of the United States, whether as a locator of a mining claim, as a homesteader, or as one asserting rights under others of the multifarious laws governing entries on public lands, who perfects his entry by compliance with the applicable Act of Congress, thereby acquires a right to the land as against the sovereign itself, as well as third persons. ° ° °"
>
> 363 F.2d 190 at 196

It is the due process protection of the *grantee or acquiree's rights* which is undertaken by the courts – not affirmative action in disposing of admittedly sovereign property. This due process right is recognized in *Larson v. Domestic & Foreign Commerce Corp., supra,* 337 U.S. 682 (1948), at page 607.

This difference will be seen in all such cases cited by petitioners: *Adams v. Witmer,* 271 F.2d 29 (9th Cir. 1958) (Pet. 10), mining claim; *Brennan v. Udall,* 379 F.2d 803 (10th Cir. 1967) (Pet. 11), oil rights; *Lewis v. Hickel,* 427 F.2d 673 (9th Cir. 1970) (Pet. 13), grazing rights; *LaRue v. Udall,* 324 F.2d 428 (D.C. Cir. 1963) (Pet. 13), grazing rights; *Boesch v. Udall,* 303 F.2d 204 (D.C. Cir. 1962) (Pet. 14), oil and gas lease; *McNeil v. Seaton,* 281 F.2d 931 (D.C. Cir. 1960) (Pet. 14), grazing rights; and *McKay v. Wahlenmaier,* 266 F.2d 35 (D.C. Cir. 1955) (Pet. 14), oil and gas lease.

(d) Effect of Administrative Procedure Act

Petitioners' contention at pages 15 through 17 that the Administrative Procedure Act constitutes a general waiver of sovereign immunity does not present any special or important reason why certiorari should be granted in this case. This Court has already rejected such a contention. In *Blackmar v. Guerre,* 342 U.S. 512, 515-516

(1952), it was stated, "Still less is the Administrative Procedure Act to be deemed an implied waiver of all governmental immunity from suit."

The several decisions by this Court applying the doctrine of sovereign immunity, discussed above (at 8 and 9), were all decided after the passage of the Administrative Procedure Act. The case at bar is of the type to which the courts have consistently and traditionally applied the doctrine both before and after the passage of the Administrative Procedure Act, *i.e.* one requiring affirmative action by the sovereign in disposing of unquestionably sovereign property.

Judge Green, in giving the district court's opinion dismissing the petitioners' first complaint in this action, cites pertinent legislative history showing that there was no legislative intent to do such an extreme act as to wipe out sovereign immunity without even mentioning it. That opinion states:

> "The Court has reviewed the legislative history of the A.P.A., Senate Doc. 248, 79th Cong., 2nd Sess., (1944-1946), and finds no indication therein that the judicial review provisions, Section 10 of the Act, were intended to have any substantive effect. In fact, the contrary appears. Carl McFarland, a member of the Attorney General's Committee and Chairman of the American Bar Association's special committee on administrative law, in testimony before the House Committee on the Judiciary stated:
>
> > . . . we do not believe that the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved. We believe that about all the statute should or could do would be to state the form of the action, *the type of acts that are reviewable in accordance with present law*, the authority of the courts to grant temporary relief so that review may be useful, *but that the scope of review should be as it is now.* (Emphasis added.)

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> In a letter from the Hon. Tom C. Clark, then United States Attorney General, incorporated into the report of the Senate Committee on the Judiciary, it is stated that Section 10 of the A.P.A. was intended to, and did, reflect existing law on the availability of judicial review of administrative actions."

In the case of *Twin Cities Chippewa Tribal C. v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967), the Secretary of the Interior was one of the defendants. The court held in regard to the claim that the Administrative Procedure Act waived sovereign immunity, as follows:

> "* * * This reliance on § 10 of the Administrative Procedure Act to establish jurisdiction below is misplaced. Section 10 of the Act does not confer jurisdiction upon the federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction. Ove Gustavsson Contr. Co. v. Floete, 278 F.2d 912, 914 (2nd Cir. 1960); Barnes v. United States, supra. Additionally, § 10 does not in itself amount to congressional consent to a suit against defendants, whose right to assert the defense of sovereign immunity is discussed above. * * *"
>
> 370 F.2d 529 at 532

As recognized by petitioners at page 17 of their petition, a similar holding is found in *Cyrus v. United States,* 226 F.2d 416, 417 (1st Cir. 1955), and in *Coalition for United Community Action v. Romney,* 316 F. Supp. 742, 746 (N. D. Ill. 1970); *Chournos v. United States,* 335 F.2d 918, 919 (10th Cir. 1964); *Cotter Corp. v. Seaborg,* 370 F.2d 686, 692 (10th Cir. 1966), and *Motah v. U.S.,* 402 F.2d, 1, 2 (10th Cir. 1968).

Petitioners, also at page 17 of their petition, claim that the decisions of the Tenth Circuit are divided on this issue and cite the case of *Brennan v. Udall,* 379 F.2d 803, 805 (10th Cir. 1967). There is no language in the opinion

stating that the Administrative Procedure Act waives sovereign immunity. The Court held that plaintiff was entitled to have his patent granted by the United States interpreted under the Act as to whether or not it included oil. As has already been discussed, permitting interpretations of land grants is based upon the theory that the laws permitting such grants gave a due process right to the patentee which was good against the Government as well as third persons and that it has long been recognized that he could assert such right against the Government. Hence, there is no such conflicting decision on the waiver issue in the Tenth Circuit – the holdings of the court in that circuit are that there is no such waiver. Also, in *National Helium Corp. v. Morton,* 455 F.2d 650, 654, 655 (10th Cir. 1971), the court recognizes the validity of *Larson v. Domestic & Foreign Commerce Corp., supra,* 337 U.S. 682 (1949), but distinguishes it on the grounds that Secretary Morton was specifically required by law to do certain things, which he failed to do, and hence that case fell within the exception to *Larson.*

Petitioners' claim (Pet. 16) that the Ninth Circuit case of *Washington v. Udall,* 417 F.2d 1310, 1320 (9th Cir. 1969), significantly narrows the defense of sovereign immunity is refuted by the language of the opinion. The court states at page 1320:

> "While we hold that the Secretary's challenged action in this case is subject to judicial review under the Administrative Procedure Act, *we strongly emphasize our opinion that such review is not available on the theory that the Act constitutes a consent of the United States to all suits of whatever nature and, as such, a blanket waiver of sovereign immunity.* In any case wherein the immunity doctrine is so transcending as to require dismissal of the suit, the Act does not provide for Administrative Review. The Supreme Court has not found jurisdiction under the Administrative Procedure Act in cases wherein the actions of

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the Secretary of the Interior have been held to be shielded from judicial review by sovereign immunity. *See* City of Fresno v. California, supra, 372 U.S. 627, 83 S. Ct. 996, 10 L.Ed. 2d 28; Dugan v. Rank, *supra*, 372 U.S. 609, 83 S. Ct. 999, 10 L.Ed. 2d 15. See also Blackmar v. Guerre, 342 U.S. 512, 515-516, 72 S. Ct. 410, 412, 96 L.Ed. 534 (1952) (8-1 decision concerning review of a Civil Service Commission decision) 'Still less is the [Administrative Procedure] Act to be deemed an implied waiver of all governmental immunity from suit,'; Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Chournos v. United States, 335 F.2d 918 (10th Cir. 1964); L. Jaffe, Judicial Control of Administrative Action 372 (1965) (Administrative Procedure Act has had a negligible effect on the basic right to judicial review but does codify the presumption of reviewability.)"

417 F.2d 1310 at 1320
(Emphasis added.)

While the opinion in *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), has some ambiguous language, it still recognizes that where the doctrine of sovereign immunity is applicable it must be applied.

The Court of Appeals for the Fifth Circuit made a general statement regarding the A.P.A. waiving sovereign immunity, as pointed out by petitioners (Pet. 15, 16), in *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961). That case involved an action by aliens to review a determination excluding them from the United States. However, in a case seven years later that same court of appeals applied the doctrine of sovereign immunity in the case of *Gardner v. Harris*, 391 F.2d 885 (5th Cir. 1968), to bar a suit brought to compel a federal superintendent of Natchez Trace Parkway to remove certain barricades which it was claimed exceeded his statutory authority and thus made him amenable as an individual to injunctive relief. The court states at page 888:

"° ° ° Undoubtedly if a Federal Court were to order the Superintendent to remove the barricades, this

> would be compelling the Government to act. Likewise it would be interfering with public administration since it would have an immediate physical bearing upon the governmental judgment on such matters as the number, type, and location of access ways from the standpoint of safety, traffic flow, and the like. ° ° °"
>
> 391 F.2d 885 at 888

Since these same things could be said about the judgment prayed for in the case at bar, we must assume that the Court of Appeals for the Fifth Circuit would also hold that sovereign immunity barred the petitioners' action here.

The waiver language in *Kletschka v. Driver*, 411 F.2d 436, 445 (2nd Cir. 1969), cited by petitioners at page 16, is only dicta, as the court specifically found apart from the waiver theory that the suit was of a type which "would not contravene sovereign immunity."

The case of *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), (Pet. 15) (which, as petitioners point out, is contrary to an earlier decision in that court) involved an action to nullify the action of the Federal Aviation Administration in letting a contract to a bidder whose bid it was claimed did not conform to the bid requirements. It was simply an action by a federal official beyond the scope of his authority, *i.e.*, *ultra vires*, where sovereign immunity would not have been applicable even in the absence of the Act.

Thus, while there is some confusing language in the Court of Appeals cases cited for the Second and District of Columbia Circuits, such language was not necessary for the holdings in the cases and hence it is not a conflict of substance but a conflict of language with the case of *Blackmar v. Guerre*, *supra*, 342 U.S. 512 (1952), and the cases cited from the First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits. All of the district court cases cited on page 16 of the petition also involve *ultra vires* actions by governmental officials which would not have been subject

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to the defense of sovereign immunity anyway. Hence the language in the opinions relating to the Administrative Procedure Act was not necessary and the cases are not significant in this regard.

Even though the language relating to the Act in the Second and District of Columbia Circuit cases can be distinguished on the ground that it was unnecessary to the decision as above described, there is one overriding reason why the decision of the Sixth Circuit in this case on sovereign immunity is not in conflict with the decisions of the Court of Appeals for the Second Circuit, the District of Columbia Circuit, or any other circuit on the question of the Administrative Procedure Act waiving sovereign immunity. No cases whatsoever have been cited by petitioners holding that the Administrative Procedure Act waives sovereign immunity when the relief requested cannot be granted merely by ordering the cessation of the conduct complained of but will require affirmative action by the sovereign disposing of unquestionably sovereign property, as would be the result in this case. There is no language in the A.P.A. which deals with an action which is, in substance, *in rem* against government property, rather than against an official of the Government who has exceeded express limits on his authority. There clearly is no conflict between the case at bar and any other Supreme Court or court of appeals case.

III

CONCLUSION

Certainly this is a case where no special or important reasons exist for granting certiorari. On the contrary, it is one where the public interest and justice will be greatly served by denying the petition.

The utilities relied on a broad unconditional legislative grant of authority in exchanging lands. Their obli-

gation to furnish much needed electric power compels them to continue to construct a generating plant on a small portion of the land received and the environmental effects are specifically considered by the agency controlling such construction. In fact, the environment is obviously benefited by the United States having nearly twice as much marsh area for wildlife refuge as it had prior to the exchange.

To permit a complaint to stand two and a half years after the exchange which merely challenges the desirability of the exchange in the opinion of the plaintiffs insofar as the general goals of wildlife protection are concerned, would not only be unjust and defeat congressional intent in giving the exchange authority, but it would also be contrary to the best established and narrowest concept of sovereign immunity. If sovereign immunity has any meaning, it is to protect a transaction such as this.

The petition for certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1005

SIERRA CLUB, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

In October 1968, the Secretary of the Interior completed an exchange of marshlands with two public utility companies, Toledo Edison Company and Cleveland Electric Illuminating Company, under 16 U.S.C. 668dd(b)(3). Under the agreement, the utility companies transferred to the United States, to become part of the Ottawa Federal Wildlife Refuge, a 480-acre tract of land in Ottawa County, Ohio, abutting on Lake Erie, and known as Darby Marsh. In exchange, the utilities received a nearby tract of land from the same Wildlife Refuge in Ottawa County, also bordering on Lake Erie, which was known as Navarre Marsh, and which consisted of 455 acres of marshland and an additional 77 acres in one corner of mostly upland.

The companies contemplated constructing on the dry portion of the land they acquired the Davis-Besse Nuclear Power Station.[1] They agreed to lease back to the United States, rent free for fifty years, the unused part of Navarre Marsh, or approximately the 455 acres of lowland, together with some adjacent property (to be leased for twenty-five years), and to install and maintain dikes and electric pumps in the area. As the court of appeals stated (Pet. App. 19a), "[u]pon completion of the exchange, the United States had a wildlife refuge of twice the number of acres it originally had (less the strips for canals and reserved rights)," in addition to other "improvements and benefits."

Two years after the land exchange became final, petitioners commenced an action in the United States District Court for the Northern District of Ohio, seeking to nullify the transaction as being contrary to the underlying statute (16 U.S.C. 668dd) and in violation of a treaty with Mexico, to enjoin construction of the Davis-Besse plant, and to obtain a declaration that 16 U.S.C. 668dd is unconstitutional. The district court (Green, J.) dismissed the complaint on grounds of sovereign immunity and of failure to state a claim on which relief could be granted (Pet. App. 2a-3a).

An amended complaint was then filed in the district court "which was a radical departure from [the] original complaint" (Pet. App. 17a). It contained a single cause of action challenging the Secretary of the Interior's transfer to the utility companies of title to Navarre Marsh as "an

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[1]Petitioners abandoned their efforts to enjoin construction of the power station in 1971, and we are advised that the companies have expended more than half the funds projected for construction and that the power station is over 40 percent completed.

arbitrary and capricious act" which "constitutes an abuse of discretion" (Pet. App. 17a). Without referring to the Darby Marsh exchange, the complaint sought an order directing the utilities to return Navarre Marsh to the United States.

The Secretary and the companies filed a motion to dismiss. The district court (Thomas, J.) granted the motion, holding that the action was barred by the doctrine of sovereign immunity, and involved a challenge to "'agency action * * * committed to agency discretion by law,' 5 U.S.C. § 701(a)(2)," which is "not reviewable under the Administrative Procedure Act" (Pet. App. 14a-15a). A divided court of appeals affirmed (Pet. App. 16a-41a).

Petitioners contend here, as they did below, that the present land exchange, consummated in 1968, should be partially set aside because the Secretary's decision to transfer Navarre Marsh, although authorized by 16 U.S.C. 668dd, was made in an arbitrary and capricious manner.[2] Both the district court and a majority of the court of appeals fully considered petitioners' arguments and determined that they were barred by the doctrine of sovereign immunity. For the reasons stated in those opinions, on which we rely, we submit that the court of appeals correctly held that (Pet. App. 26a-27a):

> Here the United States and the two utilities have owned, possessed and used for more than two years the lands which they respectively acquired by deeds of conveyance in the exchange. The District Court has no jurisdiction to undo and unravel the transaction.

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[2]Petitioners do not seek to divest the United States of title to Darby Marsh acquired in exchange for Navarre Marsh (Pet. App. 17a-18a).

We add only that the present land exchange transaction was consummated prior to enactment of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, and thus was not subject to the requirement in that statute that an Environmental Impact Statement be prepared and filed considering the various ecological effects that might result from this federal action. See 42 U.S.C. 4332(C); and see *San Francisco Tomorrow* v. *Romney*, C.A. 9, No. 72-1969, decided January 18, 1973.[3] Since it is clear that future land exchanges of this magnitude under 16 U.S.C. 668dd will, by contrast, require the preparation of a NEPA statement which is subject to judicial scrutiny, the present case does not raise any issue of continuing general importance that warrants the attention of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[3]The construction in Navarre Marsh of the Davis-Besse plant has been the subject of separate litigation under NEPA. See *Coalition For Safe Nuclear Power and Living in a Finer Environment* v. *Atomic Energy Commission*, C.A.D.C., No. 71-1396, appeal dismissed, December 27, 1972.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1005

SIERRA CLUB AND CITIZENS FOR CLEAN AIR AND WATER,
Petitioners,

v.

ROGERS C. B. MORTON, Secretary of Interior, ET AL.,
Respondents.

PETITIONERS' REPLY MEMORANDUM

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1. Both the government (Gov. Br. 2) and the utility companies (Utility Br. 1-4) contend that there is no reason for this Court to review the decision below because the United States now has use of 1,000 acres of marshland for wildlife-refuge purposes (the total of the land obtained from the utility companies and most of the land given to them) in comparison to only some 500 acres before the land exchange. However, the facts alleged in the amended complaint must be taken as true in reviewing the determination to dismiss it. The amended complaint alleged that the marsh given to the utility companies was an excellent wildlife refuge (para. 8); that construction of the nuclear power plant "would cause serious and permanent damage to the marsh areas and its ecological systems, thereby rendering the marsh largely unfit for migratory bird inhabitation" (para. 9); and that the discharge of radioactive materials from

the plant will cause serious damage to wildlife using the marsh (para. 10). The amended complaint further alleges that the marsh obtained by the federal government from the utility companies "is a wildlife refuge of extremely poor natural quality as compared to [the land given up]" (para. 18). In short, the facts as they come before this Court are that the federal respondents have surrendered an excellent wildlife refuge of over 500 acres and now have over 1,000 acres, none of which is suitable for this important purpose.

2. The government's principal contention in opposing certiorari (Gov. Br. 4) is that this case involves a transaction which occurred prior to enactment of the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, that NEPA will require the preparation of an environmental-impact statement for future land exchanges, and that therefore "the present case does not raise any issue of continuing general importance that warrants the attention of this Court." However, the preparation of an environmental-impact statement would have no relation to the present case. Even if impact statements are prepared in the future, they will only require consideration of various environmental factors. 42 U.S.C. 4332(2)(C). In contrast, petitioners contend that the statutes relied upon impose entirely separate substantive requirements relating to protection of the National Wildlife Refuge System. The issue whether suits under these statutes are barred by sovereign immunity will continue to be raised in the future despite the passage of NEPA.

3. The government's other reason for opposing certiorari is that the decision below is correct. As we showed in the petition, the decision below is in conflict with several decisions of this Court and the courts of appeals and the issues presented are of major importance to the administration of federal lands.

4. The utility companies claim (Utility Br. 8-9) that, even if a complaint alleges that a federal officer has acted unconstitutionally or beyond his statutory powers, sovereign immunity still bars suit if the action involves the disposition of federal property. However, the cases, upon which the companies rely, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691, note 11 (1948), and *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963), state that this rule applies only as to "unquestionably sovereign property" and to "property admittedly belonging to the United States." Similarly, in *United States* v. *Lee*, 106 U.S. 196 (1882), this Court held that suit could be brought to recover property unconstitutionally taken by the United States. If this case does involve land obtained by the United States (contrary to our argument below that petitioners seek only to recover land divested by the United States), it is because this land was obtained pursuant to an exchange of land which was allegedly in violation of law. The property held by the United States is not unquestionably or admittedly federal property and sovereign immunity does not apply.

5. Petitioners seek only to have the property of the United States, which was exchanged in violation of federal statutes, returned to the United States. The utility companies (Utility Br. 9-10), citing ordinary equity principles, state that, if the United States recovered the land it gave up, it would be compelled to return to the companies the property it had acquired from them.

Ordinary law concerning rights to private land does not apply. Article IV, Section 3, clause 2 provides:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States * * *.

Numerous decisions of this Court have interpreted this clause to give Congress exclusive jurisdiction over the disposition of land or other property of the United States and to give no such power to the head of an executive agency without legislation by Congress. *E.g.*, *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 336 (1841); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294 (1941). Laches, estoppel, and other equitable doctrines do not apply when the agents of the United States take action concerning federal lands beyond the power conferred on them by Congress. *E.g.*, *Hart* v. *United States*, 95 U.S. 316, 318 (1877); *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *Wilber Nat. Bank* v. *United States*, 294 U.S. 120, 123-124 (1935).

Here, the utility companies attempt to invoke an equitable doctrine in order to prevent any judicial consideration of the issue whether federal officials have disposed of federal lands without authorization by Congress. In doing so, they cite only cases and other authorities relating to transactions between private parties or local governments. These principles, however, are not applicable to the federal government—particularly since the companies have a remedy in the Court of Claims (see Pet. 9).

In any event, even if equitable principles do apply to cases involving federal-land transactions, sovereign immunity still does not bar this action. Plaintiffs seek, as the government admits (Gov. Br. 3, note 2), only the recovery of land for the United States which was wrongfully disposed of by federal officials. It is the utility companies who are contending that equitable principles require the United States to return the land obtained from the companies. The companies' contention is in the nature of a cross-claim against the United States for recovery of their land if the companies are required to return the land they obtained from the United States.

The real sovereign-immunity issue is whether the companies' cross-claim is barred by sovereign immunity and whether their sole remedy is a suit for compensation in the Court of Claims. Regardless of the resolution of that question, petitioners are entitled to have the courts determine the separate issue whether the companies must return the land they obtained to the United States. Sovereign immunity cannot possibly apply to this action. Even if sovereign immunity is deemed to prevent suit against the United States, this claim can still continue to be maintained against the companies alone.

6. This Court has stated, in summarizing the purpose of the doctrine of sovereign immunity, that "[t]he Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 704. This is, like many land-exchange cases, clearly not a situation where the government will be stopped in its tracks if petitioners' obtain judicial review of the exchange. This transaction was initiated by the utility companies for their own purposes in order to obtain federal land they desired. If anyone will be stopped, it will therefore be the companies. Certainly, sovereign immunity was not designed to protect private parties from judicial determinations whether land came into their possession legally.[1]

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[1] As petitioners showed (Pet. 14-17), there is a square conflict of circuits between the decision below and the Courts of Appeals for the District of Columbia, Second, Fourth, Fifth, and Ninth Circuits as to whether the Administrative Procedure Act constitutes a complete or partial waiver of sovereign immunity. The utility companies have clearly not shown (Utility Br. 15-21) that the decisions are consistent. For example, while the utility companies (Utility Br. 19-20) assert that the Fifth Circuit supports their position that the Administrative Procedure Act does not waive sovereign immunity, the only case they cite is *Gardner* v. *Harris*, 391 F.2d 885 (C.A. 5, 1968), which did not arise under

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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that Act. The decision of the Fifth Circuit in *Estrada* v. *Ahrens*, 296 F.2d 690, 698 (1961), that the Act does constitute a Congressional waiver of sovereign immunity, therefore continues to be good law and is in direct conflict with the decision below.